Australian Government

Attorney-General's Department

Disability Discrimination Act 1992 Review

Acknowledgement of Country

We acknowledge Aboriginal and Torres Strait Islander peoples as the traditional custodians of Australia and acknowledge their continuing connection to land, sea and community. We pay our respects to the people, the cultures and the elders past and present.

We pay our respects to all First Nations people with disability and recognise the distinct contributions they make to Australian life.

Help and support

Disability discrimination is a challenging issue and reading this paper may bring up strong feelings for some people.

If you have immediate concerns for your safety, the safety of another person, or there is an emergency, dial Triple Zero (000).

The following support services can also give you help and support:

- Lifeline (13 11 14) – National crisis support and suicide prevention services, available 24 hours a day, 7 days a week
- 13YARN (13 92 76) – Aboriginal and Torres Strait Islander crisis support line, available 24 hours a day, 7 days a week
- Kids Helpline (1800 55 1800) – National crisis support tailored for children and young people (aged 5 to 25), available 24 hours a day, 7 days a week
- 1800ELDERHelp (1800 353 374) – National support line for the abuse and mistreatment of older people
- National Disability Abuse and Neglect Hotline (1800 880 052) – Free, independent and confidential service for reporting abuse and neglect of people with disability
- Translating and Interpreting Service (131 450) – If you are a non-English speaker, you can use the Translation and Interpreting Service for assistance.
- National Relay Service TTY/Voice Calls (133 677) or Speak and Listen (1300 555 727) – if you are d/Deaf, hard of hearing, or have a speech impairment, you can call the National Relay Service for assistance.
- 1800RESPECT – provides confidential information, counselling and support services to people who are experiencing or have experienced sexual assault or domestic violence. The service is also available to family members and friends of those who have experienced violence. You can visit their website at www.1800RESPECT.org.au, or give them a call on 1800 737 732.

Accessibility

- More accessible documents relating to this review including Easy Read, Auslan videos, a plain English summary, and a one-page overview can be found on our website: https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/australias-anti-discrimination-law/review-disability-discrimination-act.
- In response to feedback from members of the disability community, this paper uses full citations instead of acronyms and abbreviations.

Having your say

You can provide a submission in response to the Issues Paper by visiting https://consultations.ag.gov.au/ and clicking 'Make a submission' under the heading 'Have your say'.

We encourage you to respond to the questions in the Issues Paper within the consultation platform. This will enable published responses to be accessible. You do not need to answer every question. You are welcome to only respond to those questions that are relevant to you or your organisation.

Survey

If you do not wish to respond to the questions in the Issues Paper but would still like to contribute to the review, you can also choose to complete a community survey. This survey contains a shorter set of questions focused on how you would like to see the Disability Discrimination Act changed. You can complete the community survey by visiting: https://consultations.ag.gov.au/rights-and-protections/dda-community-survey/.

Submissions

You can upload a written, audio or video submission if doing so is more accessible for you. You can also contact our call back service on (02) 6141 6280 and leave a message if you require assistance to make your submission.

Privacy

You can submit your response under your name or anonymously. We will publish responses at the end of the consultation period. We will not publish submissions if you do not consent, or if there is any potential legal issue with publishing the submission.

Submissions may be subject to freedom of information requests, or requests from the parliament. Personal information shared through the consultation will be treated in accordance with the *Privacy Act 1988*. For more information on how the Attorney-General's Department collects, stores and uses personal information, please visit the Attorney-General's Department's Privacy Policy at www.ag.gov.au/about-us/accountability-and-reporting/privacy-policy.

Enquiries

Please contact DDAreview@ag.gov.au or (02) 6141 6280 if you would like to discuss your feedback.

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Introduction

The *Disability Discrimination Act 1992* (Cth) (Disability Discrimination Act) was introduced into parliament in 1992. It has been described as a 'landmark' piece of legislation with an important role in furthering equality and human rights in Australia.[1]

The Disability Discrimination Act makes it unlawful to discriminate against a person due to their disability in specific areas of public life. This includes, but is not limited to, employment, education, accommodation, and accessing services and public places.

The Australian Government is committed to upholding the rights of people with disability and ensuring Commonwealth anti-discrimination laws work for people with disability. Community understanding and expectations across Australia have shifted significantly in recent decades, in part due to the operation of the Disability Discrimination Act and findings of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Disability Royal Commission).

Governments, businesses, employers, schools and others have also taken important steps to improve equality for people with disability. This includes the development of Australia's Disability Strategy 2021–2031 (Australia's Disability Strategy) — Australia's national disability policy framework. Australia's Disability Strategy sets out a plan for continuing to improve the lives of people with disability in Australia over the next 10 years.

The Disability Royal Commission was one of the most far reaching and extensive Royal Commissions, hearing from nearly 10,000 people about their experiences. It made 222 recommendations to improve the lives of people with disability in Australia. As part of its response, the Australian Government committed to reviewing the Disability Discrimination Act to strengthen protections for people with disability and ensure it remains fit-for-purpose. This paper considers opportunities to reform the Disability Discrimination Act, including progressing implementation of the 15 recommendations of the Disability Royal Commission directly relating to the Disability Discrimination Act which were accepted in principle by the Australian Government. This reflects the vital role that human rights protections play in preventing the violence, abuse, neglect and exploitation of people with disability.

1 Australian House of Representatives, *Debates*, 11 February 2009:976 (The Hon Bill Shorten MP, Parliamentary Secretary for Disabilities and Children's Services).

Improving the Disability Discrimination Act will also help further the Outcome Areas under Australia's Disability Strategy, including:

- Employment and Financial Security: *People with disability have economic security, enabling them to plan for the future and exercise choice and control over their lives.*[2]
- Safety, Rights and Justice: *The rights of people with disability are promoted, upheld and protected, and people with disability feel safe and enjoy equality before the law.*[3]
- Education and Learning: *People with disability achieve their full potential through education and learning.*[4]
- Inclusive Homes and Communities: *People with disability live in inclusive, accessible and well-designed homes and communities.*[5]
- Health and Wellbeing: *People with disability attain the highest possible health and wellbeing outcomes throughout their lives.*[6]

2 Department of Social Services, *Australia's Disability Strategy 2021–2031*, Department of Social Services, Australian Government, 2021, pp 13–15.
3 Department of Social Services, *Australia's Disability Strategy 2021–2031*, Department of Social Services, Australian Government, 2021, pp 22–27.
4 Department of Social Services, *Australia's Disability Strategy 2021–2031*, Department of Social Services, Australian Government, 2021, pp 32–35.
5 Department of Social Services, *Australia's Disability Strategy 2021–2031*, Department of Social Services, Australian Government, 2021, pp 16–21.
6 Department of Social Services, *Australia's Disability Strategy 2021–2031*, Department of Social Services, Australian Government, 2021, pp 36–41.

Scope

We are consulting on the implementation of the Disability Royal Commission recommendations with respect to the Disability Discrimination Act (15 recommendations), and other possible amendments to modernise and strengthen the Disability Discrimination Act.

This review does not question whether the Disability Discrimination Act should be improved, but rather seeks input on the *best way* to amend the Disability Discrimination Act to improve the experiences of people with disability, and people with duties under the Disability Discrimination Act, alike.

The 15 recommendations of the Disability Royal Commission that are being considered as part of this review relate to:

Definitions and interpretation

- the definitions of direct and indirect discrimination (Rec 4.23, 4.24)
- the definition and considerations for unjustifiable hardship (Rec 4.32)
- consistency between the Disability Discrimination Act and the Convention on the Rights of Persons with Disabilities (Rec 4.33, 4.34).

Duties

- the duty to provide adjustments for people with disability (Rec 4.25, 4.26)
- a positive duty for duty holders to eliminate disability discrimination (Rec 4.27, 4.28).

Protections

- the factors considered by prospective employers when determining if a prospective employee can carry out inherent requirements of the job (Rec 7.26)
- the definition of 'services' as it applies to police officers (Rec 8.19)
- suspension or exclusion of students with disability (Rec 7.2)
- offensive behaviour and vilification protections for people with disability (Rec 4.29, 4.30)
- the migration exemption (Rec 4.31).

Other amendments

Other possible amendments to the Disability Discrimination Act that are being considered as part of this review include:

- the definition of disability
- the capacity to make intersectional complaints
- scope of exemptions to the Disability Discrimination Act
- support for people who use assistance animals
- effectiveness of disability action plans
- enforceability of the Disability Standards
- other ways to modernise the Disability Discrimination Act.

Where appropriate, the review will consider the findings of other relevant inquiries and recurring issues with the Disability Discrimination Act. Many of the changes being considered have long been advocated for, whether in response to issues experienced by people with disability, or changes that have occurred since the Disability Discrimination Act commenced.

Any reforms to the Disability Discrimination Act will have implications for duty holders, including employers, small businesses and service and education providers. We recognise that appropriate guidance is essential for ensuring duty holders are equipped to discharge their obligations, and the objectives of the amendments are achieved. The role and value of guidance materials and other support will be considered throughout this review. We are seeking views on any specific guidance or support that would assist duty holders in Part 7 of this paper.

Outside the scope of this review

As outlined above, this review is focused on the Disability Discrimination Act and the implementation of recommendations of the Disability Royal Commission.

Disability Standards

The Disability Standards are subordinate legislation made under the Disability Discrimination Act. As each of the Disability Standards are reviewed every 5 years, the Disability Standards themselves are out of the scope of this review. The review will consider any opportunities for improvement to the Disability Standards framework in the Disability Discrimination Act itself.

Anti-discrimination framework

The review will also not consider Australia's anti-discrimination framework as a whole. Changes to Commonwealth laws other than the Disability Discrimination Act – including other Commonwealth anti-discrimination legislation, the *Fair Work Act 2009* and the *Australian Human Rights Commission Act 1986* – will only be considered where they are needed to implement the reforms to the Disability Discrimination Act. The anti-discrimination legislation of the states and territories are outside the scope of this review.

Australia's anti-discrimination framework

Australia's federal system of government means that each jurisdiction (Commonwealth, state and territory) has its own:

- anti-discrimination legislation
- body that promotes human rights and equal opportunity.

Commonwealth anti-discrimination legislation

Australia's federal anti-discrimination framework includes:

- *Disability Discrimination Act 1992* (Cth) (Disability Discrimination Act)
- *Age Discrimination Act 2004* (Cth) (Age Discrimination Act)
- *Racial Discrimination Act 1975* (Cth) (Racial Discrimination Act)
- *Sex Discrimination Act 1984* (Cth) (Sex Discrimination Act)
- *Australian Human Rights Commission Act 1986* (Cth) (Australian Human Rights Commission Act)

The Commonwealth anti-discrimination Acts prohibit discrimination based on protected attributes across certain aspects of 'public life'. Each of these laws prohibits both 'direct' and 'indirect' discrimination.

'Public life' means the activities that people take part in outside their home and family environments. The Commonwealth anti-discrimination legislation prohibits discrimination in employment, education, accommodation, estate planning, the provision of goods and services, and Commonwealth functions. This paper mainly refers to employment, education, housing and the provision of goods and services. Commonwealth anti-discrimination legislation, including the Disability Discrimination Act, does not apply to private life, such as interactions between family and friends.

The Australian Human Rights Commission Act establishes Australia's independent national human rights body, the Australian Human Rights Commission. It also sets out the procedure for making and resolving complaints of unlawful discrimination under the other 4 Commonwealth anti-discrimination Acts.

The *Fair Work Act 2009* (Cth) (Fair Work Act) also includes provisions that prohibit discrimination in employment on the basis of attributes such as physical or mental disability, race, age, sex and sexual orientation. The Fair Work Ombudsman and the Fair Work Commission are independent national bodies responsible for addressing rights within the workplace.

Disability Discrimination Act

The Disability Discrimination Act makes it unlawful to discriminate against a person because of their disability in many areas of public life. Both direct and indirect discrimination are unlawful.

Direct discrimination occurs when a person with disability is treated less favourably compared to a person without disability in similar circumstances, and a reason for the treatment is the person's disability.

Indirect discrimination occurs when a person with disability is required to comply with a condition or requirement which applies to everyone, but they cannot comply because of their disability, and the condition or requirement disadvantages a person with disability.

Making a complaint

If a person believes they have experienced disability discrimination, they can lodge a complaint with the Australian Human Rights Commission, which may inquire into and attempt to conciliate the complaint. If the complaint is not resolved in conciliation, the person may take their case to the Federal Court of Australia or the Federal Circuit and Family Court of Australia.

Similarly, a representative body, such as a union or a disability rights organisation, may also make a complaint to the Australian Human Rights Commission on behalf of one or more people. If a complaint cannot be resolved at the Australian Human Rights Commission, the representative body can pursue the matter through the courts.

Disability Standards

Section 31 of the Disability Discrimination Act allows the Attorney-General to make Disability Standards in relation to unlawful discrimination. There are 3 Standards currently in force:

- Disability Standards for Accessible Public Transport 2002 (Transport Standards)
- Disability Standards for Education 2005 (Education Standards)
- Disability (Access to Premises – Buildings) Standards 2010 (Premises Standards)

This paper will refer to these 3 instruments together as the Disability Standards.

The Transport Standards establish the minimum accessibility requirements for providers and operators of public transport conveyances, infrastructure and premises.

The Education Standards clarify the obligations of education and training providers, and the rights of students with disability and their families under the Disability Discrimination Act.

The Premises Standards aim to ensure that people with disability have dignified access to buildings, and provide certainty to the building industry in how it must meet its obligations under the Disability Discrimination Act.

Section 31 of the Disability Discrimination Act makes it unlawful to contravene a Disability Standard.

State and territory anti-discrimination legislation

Each state and territory also has its own anti-discrimination legislation. The main state and territory anti-discrimination laws are the:

- *Anti-Discrimination Act 1977* (NSW)
- *Equal Opportunity Act 2010* (Vic)
- *Anti-Discrimination Act 1991* (Qld)
- *Equal Opportunity Act 1984* (WA)
- *Equal Opportunity Act 1984* (SA)
- *Anti-Discrimination Act 1998* (Tas)
- *Discrimination Act 1991* (ACT)
- *Anti-Discrimination Act 1992* (NT)

These laws prevent discrimination on the basis of various characteristics in a number of different settings. Which characteristics are protected, and in what settings, differs by state and territory. All state and territory anti-discrimination laws prohibit discrimination on the basis of disability.[7]

Each state and territory has its own body which assists with discrimination complaints and promotes equal opportunity at the state and territory level.

Convention on the Rights of Persons with Disabilities

Australia is a party to the United Nations Convention on the Rights of Persons with Disabilities (Disabilities Convention). The Disabilities Convention is an international human rights convention which sets out the fundamental human rights of people with disability.

The Disabilities Convention requires countries to ensure and promote the full realisation of all human rights and fundamental freedoms for all people with disability on an equal basis with others.

7 *Equal Opportunity Act 1984* (WA) and the *Anti-Discrimination Act 1991* (Qld) use the term 'impairment' rather than 'disability'.

What we have heard

Australian Bureau of Statistics data shows that in 2022, 1-in-10 (9.9%) people with disability aged 15 years and over experienced discrimination.[8] Almost 1-in-5 young people (aged 15 to 34) with disability experienced discrimination (17.6%) over the same time period.[9] The Disability Royal Commission also highlighted the continuing unacceptable treatment of people with disability in Australia. Women with disability (10.6%) are slightly more likely to face discrimination than men (9.1%). LGB+ individuals with disability face discrimination at almost 3 times the rate of their heterosexual counterparts (27.7% vs. 8.7%).[10]

Around 5.5 million Australians, or more than 1-in-5, live with disability.[11] Reviews, inquiries and data have contributed to an evidence base that demonstrates people with disability continue to face barriers and unacceptable treatment, and often also find it hard to report and resolve these issues.

The Australian Human Rights Commission consistently receives more complaints under the Disability Discrimination Act than any other anti-discrimination law, averaging around 40% to 50% of complaints per year.[12] In the 2023–2024 financial year, 43% of complaints received by the Australian Human Rights Commission were about disability discrimination.[13] The areas of public life most commonly raised in complaints under the Disability Discrimination Act are employment, education and the provision of goods, services and facilities.

Disability discrimination

The Disability Royal Commission published the stories of more than 1,000 people with disability. These stories provided powerful examples of the barriers people with disability face in employment, education, accommodation, access to justice, and access to goods, services and public places.

8 Australian Bureau of Statistics, *Disability, Ageing and Carers, Australia: Summary of Findings*, ABS Website, 2022, accessed 26 November 2024.

9 Australian Bureau of Statistics, *Disability, Ageing and Carers, Australia: Summary of Findings*, ABS Website, 2022, accessed 26 November 2024.

10 Australian Bureau of Statistics (2022), *Disability, Ageing and Carers, Australia: Summary of Findings*, ABS Website, accessed 27 May 2025.

11 Australian Bureau of Statistics, *Disability, Ageing and Carers, Australia: Summary of Findings*, ABS Website, 2022, accessed 26 November 2024.

12 Australian Human Rights Commission, *2023–2024 Complaint Statistics*, Australian Human Rights Commission Website, accessed 18 February 2025; Australian Human Rights Commission, *2022–2023 Complaint Statistics*, Australian Human Rights Commission Website, accessed 18 February 2025; Australian Human Rights Commission, *2021–2022 Complaint Statistics*, Australian Human Rights Commission Website, accessed 18 February 2025; Australian Human Rights Commission, *2020–2021 Complaint Statistics*, Australian Human Rights Commission Website, accessed 18 February 2025.

13 Australian Human Rights Commission, *2023–2024 Complaint Statistics*, Australian Human Rights Commission Website, accessed 18 February 2025.

Employment

People with disability continue to face barriers to work.

Employers and colleagues were the most common sources of discrimination reported by people with disability in the work force.[14] Discrimination and other barriers can make it difficult to even enter the workforce – in 2022, the unemployment rate for people with disability was more than twice the rate for people without disability.[15] The high unemployment rate for people with disability contributes to the lower income levels compared to the general population. In 2022, the median gross income of people with disability was $575 per week, compared with $1055 per week for people without disability.[16]

Box 1: Jasmin's story

The Disability Royal Commission heard the story of Jasmin, who is vision impaired and works in the public service.[17]

Jasmin's accessibility needs were not considered when arranging seating in her previous department, and at both her previous and current department, she needed to use software that did not work with her assistive technology. She also had a supervisor tease her about private health issues in a staff meeting. While she has generally managed to resolve these issues, she told the Disability Royal Commission that having to fight for her rights so much has 'changed, fundamentally, who I am as a person'.

14 Australia Bureau of Statistics (ABS), *Disability, Ageing and Carers, Australia: Summary of Findings*, ABS Website, 2022, accessed 8 November 2024.

15 Australia Bureau of Statistics (ABS), *Disability, Ageing and Carers, Australia: Summary of Findings*, ABS Website, 2022, accessed 8 November 2024.

16 Australia Bureau of Statistics (ABS), *Disability, Ageing and Carers, Australia: Summary of Findings*, ABS Website, 2022, accessed 8 November 2024.

17 Disability Royal Commission (Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability), 'Voices of people with disability', *Final Report*, 2023, Volume 1, Book 2, pp 701–702.

Education

Disability discrimination in education continues to be a significant issue for people with disability and their families. The Disability Royal Commission heard stories from many families whose children with disability were excluded from schools or not given the support they needed to succeed.

Discrimination, bullying and a lack of support can make it difficult for people with disability to complete their schooling.

Box 2: Terrence's story

The Disability Royal Commission heard from the family of Terrence, an autistic primary school student.[18] Terrence was rejected from 7 public schools and 7 Catholic schools. Terrence was eventually accepted by a school, but his parents told the Disability Royal Commission that he has been bullied and assaulted, and that at one point, the school attempted to expel him.

Accommodation

People with disability also remain more likely to experience issues with accommodation. The Disability Royal Commission found that people with disability have difficulty finding accessible private and social housing. The Disability Royal Commission also found that people with disability living in group homes may be exposed to harm and lack choice and control.

Box 3: George's story

The Disability Royal Commission heard about George, who is a First Nations man who lives with bipolar disorder and attention deficit disorder.[19] George has lived in public housing for about a decade. George's mental health has deteriorated over that time because of neglect, bullying and harassment by a community housing provider. George told the Disability Royal Commission that his house had exposed wires and was generally run down. George also experienced being 'flooded in' because of drainage issues. George raised these issues with his housing provider but said that nothing was fixed, even after maintenance reports. George lives with the constant threat of eviction.

18 Disability Royal Commission, 'Voices of people with disability', *Final Report*, 2023, Volume 1, Book 2, pp 35–36.
19 Disability Royal Commission, 'Voices of people with disability' *Final Report*, 2023, Volume 1, Book 3, pp 769–770.

Health

More than 1-in-10 people with disability (11.1%) reported having difficulty accessing medical facilities.[20] Even when people with disability are able to access medical facilities, they can face discrimination and difficulties having their concerns taken seriously. The Disability Royal Commission reported that medical professionals 'consciously or unconsciously often make negative and false assumptions about the quality of life of people with disability', and can also wrongly attribute symptoms to a person's impairment rather than an unrelated health problem.[21] The Disability Royal Commission also reported compounding issues experienced by women and girls with disability trying to access healthcare, especially for sexual reproductive health.

Box 4: Di's story

The Disability Royal Commission heard from Di, who is hard of hearing, has partial paraplegia, and lives with mental illness.[22] Di said that, for years, doctors minimised her physical symptoms because of mental illness. A few years ago, Di severely injured her coccyx and was taken to hospital. Di told the Disability Royal Commission that a doctor told the ambulance officers to leave her in the corridor because she 'had a past history of "psych" issues [and] was probably faking it'.

Access to services and public places

Many people with disability told the Disability Royal Commission about not being able to access services, activities and public places due to their disability.

Data from the Australian Bureau of Statistics shows how widespread these issues are. Nearly two-thirds (63.3%) of people aged 15 years and over with disability reported that they had experienced barriers to participating in social and community activities over a period of 3 months.[23] The most commonly reported types of social activities where barriers were experienced included visiting a restaurant, café, bar or club (35.7%) and participating in a physical activity for sport, exercise or recreation (34.3%).[24]

Box 5: Aziel's story

Aziel has cerebral palsy and uses a walking frame, and told the Disability Royal Commission that almost all public toilets at beaches, sporting ovals, shops, train stations and rest areas have doors that are inaccessible for him.[25] This has left him 'stuck at home'.

20 Australia Bureau of Statistics (ABS), *Disability, Ageing and Carers, Australia: Summary of Findings*, ABS Website, 2022, accessed 8 November 2024.
21 Disability Royal Commission, 'Enabling autonomy and access', *Final Report*, 2023, Volume 6, p 333.
22 Disability Royal Commission, 'Voices of people with disability', *Final Report*, 2023, Volume 1, Book 1, p 104.
23 Australia Bureau of Statistics (ABS), *Disability, Ageing and Carers, Australia: Summary of Findings*, ABS Website, 2022, accessed 8 November 2024.
24 Australia Bureau of Statistics (ABS), *Disability, Ageing and Carers, Australia: Summary of Findings*, ABS Website, 2022, accessed 8 November 2024.
25 Disability Royal Commission, 'Voices of people with disability', *Final Report*, 2023, Volume 1, Book 2, p 377.

Access to justice

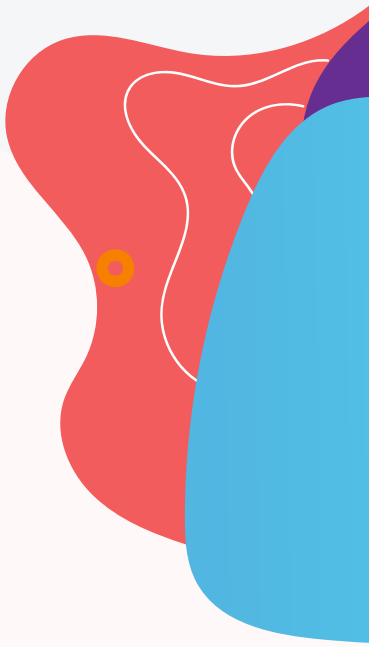
Interactions with the police and legal system represent another key area of concern.

The Disability Royal Commission found systemic deficiencies in the police's ability to respond confidently and effectively to people with disability. Many people with disability do not report violent encounters to the police. Seventy per cent of women and 58% of men with disability who experienced physical assault did not report their most recent incident of violence to police.[26] This is particularly concerning given that people with disability are more likely to experience violence. In 2016, 5.7% of adults with disability or a longterm health condition reported experiencing violence in the past 12 months, compared to 5.2% without a disability or long-term health condition.[27] The difference is even more pronounced for First Nations people with disability.[28]

The Disability Royal Commission also found that people with disability are overrepresented in the justice system and have high levels of contact at earlier stages of the criminal justice process. The Disability Royal Commission referred to an adult prisoner entrant survey, which found that almost 1-in-3 prison entrants reported a chronic condition or disability that affected their participation in day-to-day activities. This compares with 1-in-5 people in the general community.[29]

Box 6: Earl's story

The Disability Royal Commission heard from Earl, a First Nations man with an acquired brain injury.[30] Earl said that he was arrested at a casino and charged with being drunk, even though he had not consumed alcohol. He said that sometimes people wrongly thought he was drunk due to his brain injury. Earl reported that during his arrest he was 'smashed to the ground' and he was left in a cell for 8 hours.



26 Australian Bureau of Statistics (ABS), *Disability and Violence - In Focus: Crime and Justice Statistics*, ABS Website, 2021, accessed 8 November 2024.

27 Australian Bureau of Statistics (ABS), *Disability and Violence - In Focus: Crime and Justice Statistics*, ABS Website, accessed 30 January 2025.

28 Australian Bureau of Statistics (ABS), *Disability and Violence - In Focus: Crime and Justice Statistics*, ABS Website, accessed 30 January 2025.

29 Disability Royal Commission, 'Criminal justice and people with disability', *Final Report*, 2023, Volume 8, pp 33–35.

30 Disability Royal Commission, 'Voices of people with disability', *Final Report*, 2023, Volume 1, Book 1, pp 3-4.

Changes in Australian law and society

The Disability Royal Commission's findings demonstrate the need to reform the Disability Discrimination Act to strengthen protections for people with disability, and ensure it is fit-for-purpose now and in the future.

When the Disability Discrimination Act commenced in 1992, the Disabilities Convention did not yet exist. The Disabilities Convention entered into force for Australia on 16 August 2008. The Disability Discrimination Act is one of the key ways that Australia implements the Disabilities Convention in domestic law.

Australia's anti-discrimination laws have also changed since the Disability Discrimination Act commenced. Legislative changes have included the commencement of the Age Discrimination Act, which aims to prevent discrimination on the basis of age. More recently, the Sex Discrimination Act has been significantly strengthened in response to the 2020 Respect@Work: Sexual Harassment National Inquiry Report (Respect@Work Report).

As well as legal and policy changes, there have also been significant societal and technological changes in recent decades. For example, in 1996, just 3.9% of households had internet access at home; by 2016–17, this figure had risen to 86%.[31] These technological advancements have dramatically changed how we live and work, and have opened up new ways for people to participate in society.

31 Australian Bureau of Statistics (ABS), *Lifestyle: Information technology in the home*, ABS Website, 1999, accessed 27 November 2024; Australian Bureau of Statistics (ABS), *Household use of information technology*, ABS Website, 2016–17, accessed 27 November 2024.

Acknowledgements

Advocacy

People with disability and advocacy organisations have contributed to many reviews and inquiries over the 3 decades that the Disability Discrimination Act has been in force. These have included the:

- Disability Royal Commission
- Parliamentary Joint Committee on Human Rights' review of Australia's human rights framework
- Productivity Commission's 2004 review of the Disability Discrimination Act
- 5-yearly reviews of the Disability Standards

This advocacy has involved significant time and energy. We acknowledge the toll that having to restate the same problems can take, and the trauma that can come from repeatedly sharing experiences of discrimination.

This paper draws on the reports and submissions from these reviews and inquiries so that people with disability do not need to advocate again about the same issues and experiences.

Data

Different jurisdictions collect and report data about disability discrimination in different ways. Where possible, we have used data from Australian Government sources, such as the Australian Bureau of Statistics and the Australian Human Rights Commission, to improve consistency. You can find the source of each data point in the footnotes in the paper.

Interaction with the broader legislative framework

The Disability Discrimination Act is not the only piece of legislation that affects the rights of people with disability. There are various other Commonwealth and state and territory anti-discrimination laws that may also apply. For example, as outlined in Part 2, implementing a positive duty to eliminate disability discrimination would make the Disability Discrimination Act more consistent with the Sex Discrimination Act, but less consistent with the Age Discrimination Act. Additionally, the Disability Discrimination Act's interactions with other pieces of legislation means that this review must consider how any proposed amendments could affect, or be affected by, other legislation. This consideration is needed to prevent any unintended consequences.

Glossary

This section sets out the meaning of common terms used in the paper.

Applicant

An applicant is person who lodges a complaint to the Australian Human Rights Commission or applies to a court for hearing.

Burden of proof

Burden of proof (also known as the onus of proof) refers to who must prove that particular events occurred, or the reason for their occurrence, or that particular circumstances exist, in court or other legal proceedings.

Detriment test

The detriment test requires a person to prove they have been treated unfavourably because of a particular attribute. While a comparison can be used to establish the detriment a person has faced, it is not necessary. Some anti-discrimination laws in Australia use this test instead of the comparator test.

Disability action plans

A disability action plan is a document which sets out an organisation's strategy for identifying and addressing practices which might result in discrimination against people with disability and to promote the recognition of the rights of people with disability.[32] The Disability Discrimination Act encourages organisations to develop disability action plans.

Duty holder

A duty holder is any person or organisation that has a duty not to discriminate because of a person's disability under the Disability Discrimination Act. This includes public and private entities including, but not limited to: government departments and agencies, employers, schools, and goods and service providers.

Exclusionary discipline

Actions by an educational authority or educational institution that results in the withdrawal of education or training from students with disability, including suspensions and expulsions.[33]

Expulsion

Expulsion refers to the permanent removal or exclusion of a student from the school in which they are currently enrolled.

Inherent requirements

The term 'inherent requirements' is not defined in the Disability Discrimination Act. It refers to the qualifications, skills, tasks, and the way in which tasks must be performed, that are essential for a job, having regard for the nature of the employer's organisation or business.

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32 Australian Human Rights Commission, *Action plans and action plan guides*, Australian Human Rights Commission website, n.d., accessed 8 January 2025.

33 Disability Royal Commission, 'Executive Summary, Our vision for an Inclusive Australia and Recommendations', *Final Report*, 2023, p 319.

Positive duty

A positive duty is a legal obligation on duty holders to take proactive and meaningful action to prevent discrimination.[34]

Reasonable adjustment

Reasonable adjustment is defined as an adjustment that does not impose an unjustifiable hardship on the person.[35]

Reasonable condition or requirement (reasonableness element)

The reasonableness element is part of the definition of indirect discrimination. A rule or policy that may be discriminatory but is reasonable in all the circumstances is not indirect discrimination.

Respondent

A respondent is a person, corporation or organisation that an applicant has filed a complaint against to a body such as the Australian Human Rights Commission or commenced proceedings against in a court.

Suspension

A serious disciplinary consequence that prohibits an enrolled student from attending school and any school-related activities for a set period of time.

Unjustifiable hardship

Unjustifiable hardship is a defence under the Disability Discrimination Act against a finding of disability discrimination. The threshold is met where making an adjustment would impose unjustifiable hardship on the duty holder when considering all relevant circumstances of a particular case, including the benefit or detriment to any person concerned.[36]

Victimisation

Victimisation is defined in the Disability Discrimination Act as the act of subjecting or threatening to subject a person to any detriment due to that person asserting their rights, or proposing to assert their rights, under the Disability Discrimination Act or Australian Human Rights Commission Act, or making a complaint or participating in a process under one of those Acts.[37]

Vilification

A public act that could incite hatred, serious contempt or severe ridicule towards a person or group.

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34 Australian Human Rights Commission, *Positive duty compliance and enforcement*, Australian Human Rights Commission website, n.d., accessed 20 December 2024.
35 *Disability Discrimination Act 1992* (Cth) s 4(1).
36 *Disability Discrimination Act 1992* (Cth) s 11.
37 *Disability Discrimination Act 1992* (Cth) s 42.

Part 1 – Updating understandings of disability and disability discrimination

Definition of disability

Summary

- The Disability Discrimination Act was originally drafted in 1992 with a social model of disability in mind, and uses a definition of disability that was intended to be broad and encompass all people with disability.[38]
- We have heard from stakeholders that the language in the current definition of disability needs to be modernised to better reflect modern understandings of disability. In particular, stakeholders have said that the definition of disability uses negative and deficit-based language.
- We are seeking feedback on whether the definition of disability in the Disability Discrimination Act needs to be modernised, and if so, how this could be achieved.

Discussion

The 2 primary models for defining and understanding disability are the medical model and the social model (explained in box 7 below). In the decades since the social model was first introduced, other models of disability have built upon the social model, including a capability approach model, cultural model and human rights model.[39] First Nations concepts of disability are also different to western concepts of disability. Many First Nations languages do not include a word for disability, therefore, the term may not currently express First Nations' concepts or experiences.[40]

38 Australian Government Productivity Commission, 'Review of the *Disability Discrimination Act 1992', Productivity Commission Inquiry Report*, Volume 1, 30 April 2004, pp 14–15 and 41.

39 Sophie Mitra, 'The Capability Approach and Disability', *Journal of Disability Policy Studies*, 2006, 16(4):236–247; Anne Waldschmidt, 'Disability–Culture–Society: Strengths and weaknesses of a cultural model of dis/ability', *ALTER, European Journal of Disability Research*, 2018, 12:67–80; Theresia Degener, 'A human rights model of disability', *Routledge Handbook of Disability Law and Human Rights*, Routledge, 1st edn, 2016; Gerald Quinn, '*Social Inclusion, Disability and Human Rights*', *Statement of Mr Gerard Quinn (United Nations Special Rapporteur on the rights of persons with disabilities) before the Disability Royal Commission*, 12 December 2023, STAT.0700.0001.0001; See Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law*, Federation Press, 3rd edn, 2018, p 335.

40 National Indigenous Australians Agency, *Disability Sector Strengthening Plan* [PDF 1,432KB], National Indigenous Australians Agency, Australian Government, 2022, p 16, accessed 30 January 2025.

Box 7: Medical and social models of disability

Contemporary understandings of disability can be traced back to the late twentieth century with the rise of the disability rights movement. The movement rejected a medical model of disability and has paved the path toward a social model of disability.[41]

Under the medical model, people with disability are viewed as 'abnormal' with something that is 'wrong with them that needs fixing' (also known as ableism). People with disability are seen as disabled by their individual traits and the multi-dimensional factors that impact people with disability are not considered. It views disability solely as a deficit located within the individual.[42]

The social model recognises that it is societal practices that are disabling and not the traits of an individual. This covers certain attitudes, practices and structures that can be disabling and act as barriers preventing people from fulfilling their potential and exercising their rights as equal members of the community. The social model seeks to change society in order to accommodate people with disability. It does not seek to change people with disability to accommodate society.[43]

Experts have noted that while the Disabilities Convention is based on the social model, it takes one step further in promoting a human rights model of disability.[44] Like the social model of disability, the human rights model recognises that disability is a social construct.[45] The United Nations Committee on the Rights of Persons with Disabilities General Comment Number 6 on Article 5 (equality and non-discrimination) further states that impairment is part of human diversity and dignity.[46]

Box 8: The United Nations Committee on the Rights of Persons with Disabilities General Comment Number 6 on Article 5

The human rights model of disability recognises that disability is a social construct and impairments must not be taken as a legitimate ground for the denial or restriction of human rights. It acknowledges that disability is one of several layers of identity. Hence, disability laws and policies must take the diversity of people with disabilities into account. It also recognises that human rights are interdependent, interrelated and indivisible.[47]

41 See Rosemary Kayess and Therese Sands, 'Convention on the Rights of Persons with Disabilities: Shining a light on Social Transformation', *Research report prepared for the Disability Royal Commission*, September 2020, p 6.

42 See Department of Social Services, ***National Autism Strategy 2025-2031***, Department of Social Services, Australian Government, 2025, pp 47 and 50.

43 Rosemary Kayess and Therese Sands, 'Convention on the Rights of Persons with Disabilities: Shining a light on Social Transformation', *Research report prepared for the Disability Royal Commission*, September 2020, p 8; Anne Waldschmidt, 'Disability–Culture–Society: Strengths and weaknesses of a cultural model of dis/ability', *ALTER, European Journal of Disability Research*, 2018, 12:67–80.

44 Rosemary Kayess and Therese Sands, 'Convention on the Rights of Persons with Disabilities: Shining a light on Social Transformation', *Research report prepared for the Disability Royal Commission*, September 2020, p 9 citing Theresia Degener, 'Disability in a human rights context', *Laws*, 2016, 5(3):1–24, pp 3 and 8.

45 United Nations Committee on the Rights of Persons with Disabilities, *General comment no. 6 (2018) on equality and non-discrimination* (Geneva, 26 April 2018) UN Doc D/C/GC/6, p 2.

46 United Nations Committee on the Rights of Persons with Disabilities, *General comment no. 6 (2018) on equality and non-discrimination* (Geneva, 26 April 2018) UN Doc D/C/GC/6, p 2.

47 United Nations Committee on the Rights of Persons with Disabilities, *General comment no. 6 (2018) on equality and non-discrimination* (Geneva, 26 April 2018) UN Doc D/C/GC/6, p 2.

Australia established the Disability Discrimination Act well before the creation of the Disabilities Convention and its human rights model of disability. While the Disability Discrimination Act is broadly based on the social model of disability, the Productivity Commission in 2004 said that the definition of disability used a medical model:

- In relation to discrimination law, a medical approach has a role in defining impairments and identifying people with disabilities, while the social approach has a role in describing how discrimination takes place and how it should be addressed.[48]

Over time understandings of disability have evolved and continue to evolve.[49] This evolving understanding has been reflected through amendments to the definition of disability within some Australian state and territory legislation, shifting the definitions to align more closely with the social model. The *Disability Inclusion Act 2024* (ACT) and the *Disability Rights, Inclusion and Safeguarding Act 2024* (TAS) are recent examples of legislation that defines disability in accordance with the social model, particularly by acknowledging that a person's disability can hinder their participation in society when it interacts with barriers to accessibility.[50,51]

48 Australian Government Productivity Commission, 'Review of the *Disability Discrimination Act 1992*', *Productivity Commission Inquiry Report*, 30 April 2004, p 15.
49 Convention on the Rights of Persons with Disabilities (New York, 13 December 2006) [2008] UNTS 2515, p 3 (Preamble).
50 *Disability Inclusion Act 2024* (ACT).
51 *Disability Rights, Inclusion and Safeguarding Act 2024* (Tas) s 5.

Shifting away from a deficit-based definition of disability

Since the enactment of the Disability Discrimination Act in 1992, the definition of disability in the Act has not substantially changed. The definition was amended once in 2009 in response to recommendations made by the Productivity Commission in 2004. These amendments were minimal and clarified preexisting understandings of the definition.[52]

Box 9: What were the changes to the definition of disability in 2009?

The amendments in 2009 clarified 2 things. First, the amendments clarified that genetic predispositions to a disability are covered by the Disability Discrimination Act. Second, that 'disability' includes behaviour that is a symptom or manifestation of the disability.[53] The phrases in italics below were added to the definition of disability in 2009:

disability, in relation to a person, means:

a. total or partial loss of the person's bodily or mental functions; or
b. total or partial loss of a part of the body; or
c. the presence in the body of organisms causing disease or illness; or
d. the presence in the body of organisms capable of causing disease or illness; or
e. the malfunction, malformation or disfigurement of a part of the person's body; or
f. a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or
g. a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour;

and includes a disability that:

h. presently exists; or
i. previously existed but no longer exists; or
j. may exist in the future (*including because of a genetic predisposition to that disability*); or
k. is imputed to a person.

*To avoid doubt, a **disability** that is otherwise covered by this definition includes behaviour that is a symptom or manifestation of the disability.*[54]

Some stakeholders have suggested that the wording of the current definition of disability could be amended to reflect more contemporary understandings of disability.

52 Explanatory Memorandum, Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008 (Cth), p 5.
53 Explanatory Memorandum, Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008 (Cth), p 5.
54 *Disability Discrimination Act 1992* (Cth) s 4.

The current definition uses terminology that does not align with the social or human rights models of disability. These words include 'malfunction', 'malformation', 'disfigurement' and 'disturbed'. Stakeholders in recent reviews of anti-discrimination laws in Queensland and Western Australia have commented that these words carry unnecessarily negative undertones. The Queensland Human Rights Commission received submissions that stated that the definition of disability needs to 'use language that is not inherently deficit based' and remove references to outdated language such as 'malfunction', 'malformation' and 'disfigurement'.[55] Similarly, some stakeholders in Western Australia submitted that 'disturbed behaviour is problematic as it presents as something which relates to aggression or violence rather than nuances associated with particular conditions.'[56]

While it is important to ensure that a legal definition of disability is clear and appropriately broad, there may be scope to reframe it to reflect modern terminology.

Using 'health status' to define HIV and other health conditions

While the definition of disability currently covers a broad range of health conditions, including HIV and others, some stakeholders in the 2022 review of Queensland's *Anti-Discrimination Act 1991* (Qld) expressed that health conditions such as HIV as well as mental health or psychosocial disability were inappropriately categorised under 'disability'. Stakeholders stated that they did not identify with the language of disability and felt alternative wording could better reflect their lived experiences. This could include language such as 'health status' or 'irrelevant medical record'.[57]

Neurodiversity in the definition of disability

Some stakeholders have expressed concerns over the wording in the definition that captures the broad spectrum of neurodiversity. Currently, the definition categorises neurodiversity as a 'disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction'.[58] This deficit framing of neurodiversity has been criticised in the past, where the language suggests that a person's cognitive ability is measured 'by a single yardstick' of what constitutes 'normal' cognitive ability.[59] Contrary to what the human rights model of disability advocates for, it also fails to recognise and celebrate the positives of neurodiversity.[60]

55 Queensland Human Rights Commission, 'Building belonging: Review of Queensland's *Anti-Discrimination Act 1991*', *Final Report*, 2022, p 265.
56 Law Reform Commission of Western Australia, 'Review of the *Equal Opportunity Act 1984* (WA)', *Final Report*, 2022, p 73.
57 Queensland Human Rights Commission, 'Building belonging: Review of Queensland's *Anti-Discrimination Act 1991*', *Final Report*, 2022, pp 266–267.
58 *Disability Discrimination Act 1992* (Cth) s 4.
59 Bruce Arnold, Patricia Easteal Am, Simon Easteal and Simon Rice Oam, 'It just doesn't add up: ADHD/ADD, the workplace and discrimination', *Melbourne University Law Review, 2010*, 34:359–391.
60 Bruce Arnold, Patricia Easteal Am, Simon Easteal and Simon Rice Oam, 'It just doesn't add up: ADHD/ADD, the workplace and discrimination', *Melbourne University Law Review, 2010*, 34:359–391.

Using the word 'impairment' or 'disability'

In the past there have been discussions as to whether the word 'disability' or 'impairment' should be used in Australian anti-discrimination law.[61] Currently, anti-discrimination legislation in most Australian jurisdictions use 'disability' as opposed to 'impairment'. Most recently in 2022, the Northern Territory amended its *Anti-Discrimination Act 1992* (NT) to use the word 'disability' in order to 'reflect modern terminology'.[62]

Advocates for using 'impairment' have said that making anti-discrimination legislation refer to discrimination on the ground of impairment rather than disability better reflects the social model of disability. This view suggests that if disability results from societal practices, discrimination is a 'disabling' process experienced by people with impairments.[63]

Queensland and Western Australia are the remaining jurisdictions in Australia that use 'impairment'. In 2022, both the Queensland Human Rights Commission and Law Reform Commission of Western Australia recommended using 'disability' to bring the legislation in line with community understandings of disability and also build consistency with the language in other Australian anti-discrimination legislation and the Disabilities Convention.[64] However, recent amendments to the *Anti-Discrimination Act 1991* (Qld) did not change 'impairment' to 'disability'.[65]

Interactions with the Fair Work Act

The Fair Work Act uses the term 'physical or mental disability', rather than 'disability', and does not define this term. The Disability Royal Commission recommended that the Fair Work Act be amended to adopt the definition of 'disability' in the Disability Discrimination Act, to provide a consistent definition across these legal frameworks.

Consultation questions

1. **How should disability be defined in the Disability Discrimination Act?**
2. **What factors should be considered in developing a new definition of disability?**

61 See for example Australian Government Productivity Commission, 'Review of the *Disability Discrimination Act 1992*', *Productivity Commission Inquiry Report*, Volume 1, 30 April 2004, pp 13–14; Queensland Human Rights Commission, 'Building belonging: Review of Queensland's *Anti-Discrimination Act 1991*', *Final Report*, 2022, pp 262–263; Law Reform Commission of Western Australia, 'Review of the *Equal Opportunity Act 1984* (WA)', *Project 111 - Final Report*, 2022, pp 72–74.

62 Explanatory Statement, Anti-Discrimination Amendment Bill 2022 (NT), p 3.

63 Queensland Human Rights Commission, 'Building belonging: Review of Queensland's *Anti-Discrimination Act 1991*', *Final Report*, 2022, p 262 citing Australian Discrimination Law Experts Group, Submission in response to the Queensland Human Rights Commission's Review of Queensland's *Anti-Discrimination Act 1991*, 1 March 2022, p 46. See also Australian Government Productivity Commission, 'Review of the *Disability Discrimination Act 1992*', *Productivity Commission Inquiry Report*, Volume 1, 30 April 2004, pp 13–14.

64 Queensland Human Rights Commission, 'Building belonging: Review of Queensland's *Anti-Discrimination Act 1991*', *Final Report*, 2022, pp 262–263; Law Reform Commission of Western Australia, 'Review of the *Equal Opportunity Act 1984 (WA)*', *Project 111 - Final Report*, 2022, pp 72–74.

65 Respect at Work and Other Matters Amendment Bill 2024 (Qld).

Addressing intersectionality

Summary

- The Commonwealth anti-discrimination framework protects people from discrimination on the basis of many protected attributes, including disability, age, sex and race. While the Commonwealth anti-discrimination framework protects different attributes under separate pieces of legislation, a person's lived experience can intersect across multiple identities.
- We have heard the importance of considering intersectionality when undertaking reform of the Disability Discrimination Act.
- We are seeking your views on how the Disability Discrimination Act could be amended to facilitate stronger protections against discrimination on the basis of intersectional identities. Due to the scope of this review, we will only be focusing on what changes can be made to the Disability Discrimination Act.

Discussion

Intersectionality

Intersectionality recognises that a person or group of people can be affected by multiple and compounding forms of discrimination and disadvantage due to their race, sex, gender identity, sexual orientation, disability, class, religion, age, social origin, and other identity markers. For example, a First Nations woman with disability may experience discrimination with respect to her First Nations identity, her gender, and her disability.

Intersectionality may also refer to a person who has multiple disabilities. For example, a person with physical and psychosocial disabilities, or a physical disability and neurodivergent experience may experience discrimination on the basis of one or more disability.

We understand that the Deaf community also identify as a culturally and linguistically diverse community, as well as part of the disability community. A member of the Deaf community may therefore experience discrimination as both a person with disability and a person from a culturally and linguistically diverse background.

There is growing understanding in Australia of the need to provide protection for people with intersecting experiences.[66] Legislation in Tasmania and the Australian Capital Territory have included definitions of intersectionality in the *Disability Rights, Inclusion and Safeguarding Act 2024* (TAS) and *Disability Inclusion Act 2024* (ACT). Both of these Acts explicitly define intersectionality and highlight the importance of acknowledging peoples' intersecting experiences when consulting with people with disability or by acknowledging that barriers to accessibility may be compounded by intersectionality.[67,68]

66 Alysia Blackham and Jeromey Temple, 'Intersectional Discrimination in Australia: An Empirical Critique of the Legal Framework', *UNSW Law Journal*, 2020, 43(3):773–800, p 774.
67 *Disability Rights, Inclusion and Safeguarding Act 2024* (Tas) ss 5 and 17.
68 *Disability Inclusion Act 2024* (ACT) Dictionary and s 6.

Intersectionality under the Disability Discrimination Act and anti-discrimination framework

In Australia, the 5 federal anti-discrimination Acts protect people from discrimination on the ground of different attributes. A person may face discrimination due to multiple and compounding attributes.

Currently, the Disability Discrimination Act provides that if an action is done for 2 or more reasons, and one of the reasons is the disability of the person (even if it is not the 'dominant' or 'substantial' reason), then the action is taken to be done because of disability for the purposes of the Disability Discrimination Act.[69] This enables a person to make a complaint under the Disability Discrimination Act, where the discrimination occurred for multiple reasons, without needing to distinguish that the person's disability was more important than another reason for the discrimination.[70]

When lodging a complaint to the Australian Human Rights Commission, a person can indicate one or more reasons that they believe is the reason for the discrimination.[71] Due to the flexibility of the conciliation process, the Australian Human Rights Commission can and does consider discrimination due to multiple attributes and applicants do not have to choose a singular attribute as the reason for the discrimination.

Due to the less flexible and more technical legal nature of courts, an applicant may face challenges if an unlawful discrimination case on the basis of multiple or compounded protected attributes was taken to court. For example, while an applicant could bring claims under multiple anti-discrimination Acts, it may be difficult to provide grounds for discrimination for separate attributes and this may increase the burden for people bringing claims of discrimination.[72]

The current definition for direct discrimination under the Disability Discrimination Act uses what is called the 'comparator test' (see box 10). A person must prove they have been treated less favourably by comparing how they have been treated to the treatment of another person who does not have their disability in similar circumstances (the comparator). It may be particularly difficult for people with intersecting identities to meet the comparator test, as it is unclear how to choose who the applicant would be compared against. Removing or amending the comparator test may therefore improve protections for people with intersecting identities.

It could also be valuable to amend the Disability Discrimination Act to clarify that claims alleging unlawful discrimination include discrimination on the basis of intersecting or combined protected attributes, including multiple disabilities.

Consultation questions

3. **Would the Disability Discrimination Act be strengthened by expressly allowing claims to be brought for multiple or combined protected attributes?**
4. **Could any other changes be made to the Disability Discrimination Act to recognise and provide protection for people with disability who have intersecting identities, or addressing compounding discrimination?**

69 *Disability Discrimination Act 1992* (Cth) s 10.
70 Explanatory Memorandum, Disability Discrimination Bill 1992 (Cth), p 6.
71 Australian Human Rights Commission, *Make a complaint*, Australian Human Rights Commission website, n.d., accessed 30 January 2025.
72 Alysia Blackham and Jeromey Temple, 'Intersectional Discrimination in Australia: An Empirical Critique of the Legal Framework', *UNSW Law Journal*, 2020, 43(3):773–800, p 779.

Recommendation 4.23 – Amending the definition of direct discrimination

Summary

- The Disability Discrimination Act currently requires a person with disability to establish the following factors to prove they have experienced direct discrimination:
  - They have been treated less favourably than a person without disability in similar circumstances (the comparator test); and
  - The treatment they experienced was because of the disability (causation).[73]
- The Disability Royal Commission found that this test operates as a barrier to people seeking protection from discrimination, and recommended that the definitions of direct and indirect discrimination needed to be simplified.[74,75]
- We are seeking your feedback on how the definition of direct discrimination in the Disability Discrimination Act could be amended to make it easier to understand and practical for both people with disability and duty holders.

Discussion

The Disability Discrimination Act's current two-step test for direct discrimination requires the applicant to prove that:

- they have been treated less favourably than a person without disability in similar circumstances (comparator test); and
- the treatment they experienced was because of the disability (causation).[76]

The Disability Royal Commission found that this definition is complex and difficult to use. The main 2 issues they found were:

- needing to prove direct discrimination by making a comparison to someone without a disability in similar circumstances (comparator test) is technical and difficult
- requiring a person to prove (burden of proof) that the duty holder's reason for treating them less favourably was because of their disability is difficult, particularly when they may not have access to all of the information that led to the treatment (causation).

To address the first issue, the Disability Royal Commission recommended removing the need to make a comparison when proving direct discrimination. Instead, they recommended that the focus should be on the unfavourable treatment or detriment that the person with disability has faced. For the second issue, the Disability Royal Commission recommended that the Disability Discrimination Act be amended to shift the burden of proof so that the respondent would need to prove that the reason for their treatment of the person with disability was not because of the person's disability.

73 *Disability Discrimination Act 1992* (Cth) s 5(1).
74 Disability Royal Commission, 'Realising the human rights of people with disability', *Final Report*, 2023, Volume 4, p 302.
75 Disability Royal Commission, 'Realising the human rights of people with disability' *Final Report*, 2023, Volume 4, p 279.
76 *Disability Discrimination Act 1992* (Cth) s 5(1).

Table 1: Current definition of direct discrimination and proposed changes

	Current definition	DRC recommendation/ proposed changes
Elements of direct discrimination	• less favourable treatment (comparator) • causation.	• unfavourable treatment (**NO** comparator) • causation.
Burden of proof	• The applicant must show facts and circumstances of the detriment they suffered. • The applicant must show that they are a person with disability. • **The applicant** must show that the detriment they suffered was because of their disability.	• The applicant must show facts and circumstances of the detriment they suffered. • The applicant must show that they are a person with disability. • **The respondent** must show that the detriment the applicant suffered was NOT because of their disability.

Comparator test

Many stakeholders have criticised the comparator test, including community legal centres, academics and peak disability and human rights bodies.[77] A major criticism of the comparator test is that the task of identifying an appropriate comparator is practically difficult and artificial.[78] The comparator test has also been criticised for moving the focus away from the harm on the affected person.

Box 10: What is the comparator test?

The comparator test is part of the definition of direct discrimination in the Disability Discrimination Act. A person must prove they have been treated less favourably by comparing how they have been treated to the treatment of another person who does not have their disability in similar circumstances (the comparator). The comparator may be real or hypothetical. One of the difficulties is that in many cases it is quite hard to identify a real person that can serve as a comparator. The applicant and the courts would then need to create a comparator that is entirely hypothetical, which is a complicated and technical task.

77 Disability Royal Commission, 'Realising the human rights of people with disability', *Final Report*, 2023, Volume 4, p 300. See for example Victoria Legal Aid, *Submission in response to the Disability Royal Commission [PDF 812KB]*, 30 April 2020, SUB.001.00215_01; Kate Rattigan, 'Purvis v New South Wales (Department of Education & Training): A case for amending the Disability Discrimination Act 1992', *Melbourne University Law Review*, 2004, 28(2):532–563; Jacob Campbell, 'Using anti-discrimination law as a tool of exclusion: A critical analysis of the Disability Discrimination Act 1992 and Purvis v NSW', *Macquarie Law Journal*, 2005, 5:201–220; Australian Human Rights Commission, *Submission in response to the Disability Royal Commission 'Employment' Issues Paper*, 24 September 2020, ISS.001.00459; Australian Human Rights Commission, *Free and Equal: An Australian Conversation on Human Rights*, Australian Government, 2021, p 342.

78 Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law,* Federation Press, 3rd edn, 2018, p 95.

As an alternative, the Disability Royal Commission and many stakeholders have recommended that the test should focus on whether a person has been treated unfavourably because of their disability, also known as the detriment test. The detriment test would place emphasis on whether a person with disability has been treated unfavourably and remove the need for identifying or constructing an appropriate comparator.

Using the detriment test instead of the comparator test is not novel in Australia. Multiple reviews and inquiries into Australian anti-discrimination law have recommended adopting the detriment test over several decades. Recent reviews and inquiries include the Queensland Human Rights Commission's review of the *Anti-Discrimination Act 1991* (Qld) and the Law Reform Commission of Western Australia's review of the *Equal Opportunity Act 1984* (WA) in 2022. Currently, anti-discrimination legislation in Victoria (*Equal Opportunity Act 2010* (Vic)) and the Australian Capital Territory (*Discrimination Act 1991* (ACT)) both use the detriment test.[79] Case law in those jurisdictions has confirmed that there is no requirement to establish a comparator.[80]

The Fair Work Act also uses a similar test to the detriment test, prohibiting 'adverse action' against a person due to a number of protected attributes, including their physical or mental disability.[81] The definition of 'adverse action' against an employee includes 'alter[ing] the position of the employee to the employee's prejudice'.[82] This has been found to include issuing an employee a written warning, reducing their status and level of responsibility, and altering their shifts. [83,84,85]

Causation and burden of proof

Under the current model, an applicant must prove that they were treated less favourably and that the reason for their treatment was because of their disability. However, it can be difficult for the person with disability to establish the reasons for the treatment, especially when the respondent would usually have the relevant information and records to explain why they acted or failed to act in a particular way. The Disability Royal Commission found that in practice, a court usually expects the respondent to explain why they made a decision, or acted or failed to act in a way that caused the less favourable treatment of the applicant, but this is not a requirement.[86]

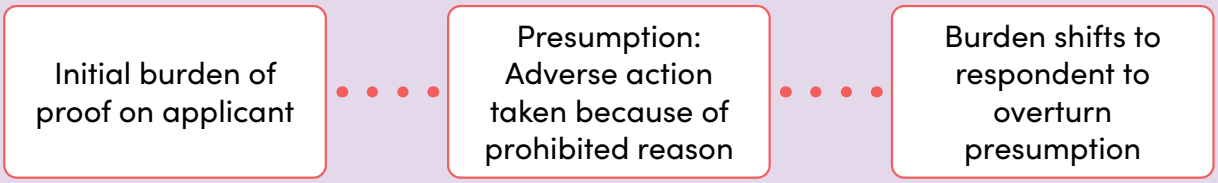
The Disability Royal Commission recommended adopting a burden of proof for direct discrimination in the Disability Discrimination Act that is similar to the burden of proof in the Fair Work Act, where the applicant must prove that the treatment occurred and the respondent must prove that the treatment was not on the basis of the person's disability.

79 *Equal Opportunity Act 2019* (Vic) s 8; *Discrimination Act 1991* (ACT) s 8(2).
80 Victoria Legal Aid, ***Submission in response to the Disability Royal Commission [PDF 812KB]***, 30 April 2020, SUB.001.00215_01, p 13 citing *Prezzi v Discrimination Commissioner* (1996) 39 ALD 729 and Slattery v Manningham City Council (Human Rights) [2013] VCAT 1869.
81 *Fair Work Act 2009* (Cth) s 351.
82 *Fair Work Act 2009* (Cth) s 342.
83 *Construction, Forestry, Mining & Energy Union v Coal & Allied Operations Pty Ltd* [1999] FCA 1531.
84 *Wilkie v National Storage Operations Pty Ltd* [2013] FCCA 1056.
85 *Construction, Forestry, Mining and Energy Union v Endeavour Coal Pty Ltd* [2013] FCCA 473.
86 Disability Royal Commission, 'Realising the human rights of people with disability', *Final Report*, 2023, Volume 4, p 301.

Box 11: What is the burden of proof under the Fair Work Act?

The Fair Work Act prohibits an employer from taking adverse action against an employee for a prohibited reason.[87] One of the protections makes it unlawful for employers to discriminate against an employee because of their disability.[88]

For example, dismissing an employee because they have a disability is unlawful. If an employee establishes that they were dismissed and that they have a disability, it is presumed that the employee was dismissed because of their disability unless the employer proves otherwise.[89] The Fair Work Act's approach to burden of proof may be summarised as follows:



Recent reviews of Australian discrimination law in Queensland and Western Australia have also recommended adopting a similar model for their respective anti-discrimination Acts.[90]

The Disability Royal Commission's proposal could alternatively be implemented using the United Kingdom's legislation as a model.[91] Under the United Kingdom model, the person with disability bears the initial burden of proof to establish a primary case for why they believe they have been discriminated against, after which the respondent must prove that their conduct was not because of the person's disability.[92] This differs from the Fair Work Act approach, because it still requires the applicant to prove on the balance of probabilities that the discrimination occurred before the respondent is then required to establish that they did not intend to engage in discriminatory conduct. The Fair Work Act approach does not require an applicant to establish a primary case of discrimination and only requires the applicant to prove that the conduct occurred and that they have a disability before the respondent must then prove that the conduct was not on the basis of the person's disability.

Consultation questions

5. **What test should be used to ensure that the definition of direct discrimination is easy to understand and implement for both duty holders and people with disability, and why?**
6. **How should the burden of proof be addressed in the Disability Discrimination Act?**

87 See *Fair Work Act 2009* (Cth) Part 3–1.
88 *Fair Work Act 2009* (Cth) s 351.
89 *Fair Work Act 2009* (Cth) s 361.
90 Queensland Human Rights Commission, 'Building belonging: Review of Queensland's *Anti-Discrimination Act 1991*', *Final Report,* 2022, pp 200–203; Law Reform Commission of Western Australia, 'Review of the *Equal Opportunity Act 1984 (WA)*', *Project 111 - Final Report,* 2022, pp 210–213; ACT Law Reform Advisory Council, 'Review of the *Anti-Discrimination Act 1991 (ACT)*', *Final Report,* 2015.
91 *Equality Act 2010* (UK) s 136.
92 See *Royal Mail Group Ltd v Efobi* [2021] UKSC 33.

Recommendation 4.24 – Amending the definition of indirect discrimination

Summary

- The current definition of indirect discrimination in the Disability Discrimination Act has 4 elements:
  - a requirement to comply with a condition, requirement or practice
  - the condition, requirement or practice disadvantages people with disability
  - the person does not or would not comply, or is not able or would not be able to comply, because of their disability
  - the condition, requirement or practice is not indirect discrimination if it is a reasonable requirement, condition or practice (reasonableness element).
- To simplify this test, the Disability Royal Commission recommended removing the reasonableness element from the definition of indirect discrimination.
- We are seeking your feedback on how to make the definition of indirect discrimination in the Disability Discrimination Act easier to understand and practical for both people with disability and duty holders.

Discussion

The current definition of indirect discrimination in the Disability Discrimination Act consists of 4 elements:

- a person is required to comply with a condition, requirement or practice
- the condition, requirement or practice disadvantages people with disability
- the person does not or would not comply, or is not able or would not be able to comply
- the condition, requirement or practice is not indirect discrimination if it is a reasonable requirement, condition or practice (reasonableness element).

As outlined in the fourth element above, a requirement or condition that disadvantages people with disability but is reasonable in the circumstances, is not indirect discrimination (reasonableness element). Additionally, it is an exception to indirect discrimination if avoiding the discrimination would impose an unjustifiable hardship on duty holders.

Therefore, the duty holder must prove that the requirement or condition was reasonable and/or that avoiding the discrimination would present an unjustifiable hardship.

Reasonableness element

This part discusses the reasonableness element. Figure one below shows where the reasonableness element fits within the test for indirect discrimination in the Disability Discrimination Act.

Figure 1: Elements of indirect discrimination – reasonableness element

The Disability Royal Commission recommended removing the reasonableness element and focusing consideration on only the exception of unjustifiable hardship.

Currently, under the Disability Discrimination Act, the respondent would not be found to have indirectly discriminated against a person if they can show that a requirement or condition they imposed upon a person was reasonable in the circumstances.[93]

Further, even if a condition is found to be unreasonable, the respondent may additionally rely on the unjustifiable hardship provisions (see Part 3). The Disability Royal Commission stated that there should be a closer examination of the reasonableness element in indirect discrimination and unjustifiable hardship to remove what appears to be several layers of exceptions or defences.[94]

Box 12: What is the exception of unjustifiable hardship?

If the treatment of a person with disability has initially been established as disability discrimination, the Disability Discrimination Act contains an exception – if requiring the duty holder to avoid the discrimination would impose an unjustifiable hardship.

For example, it is discrimination if an employer refuses to make reasonable adjustments to help a person with disability carry out the inherent requirements of a job. However, in some circumstances it may be unjustifiable to impose an obligation on the employer to make adjustments if it is too costly or difficult.

93 *Disability Discrimination Act 1992* (Cth) s 6(3).
94 Disability Royal Commission, 'Realising the human rights of people with disability', *Final Report*, 2023, Volume 4, p 304.

Alternatives for clarifying the reasonableness element

As alternatives to the Disability Royal Commission's recommendation to remove the reasonableness element from the definition of indirect discrimination, previous inquiries and reviews have recommended 2 other ways that the reasonableness element can be clarified:

- providing additional guidance on factors to consider when determining whether something was reasonable
- adopting a 'legitimate and proportionate' test.

Regarding the first option to provide additional guidance, other Commonwealth, state and territory anti-discrimination legislation includes different sets of criteria for determining the reasonableness element, including the *Sex Discrimination Act 1984* (Cth), *Equal Opportunity Act 2010* (Vic), *Anti-Discrimination Act 1991* (Qld) and *Discrimination Act 1991* (ACT).[95] Recent reviews of Western Australian and Queensland anti-discrimination legislation have also recommended the inclusion of a non-exhaustive list of factors to assist in consideration of what is 'reasonable'.[96] The reviews concluded that a list would create clearer guidance about what constitutes a reasonable requirement or condition.

Another alternative would be inserting a 'legitimate and proportionate' test, like that currently used by the United Kingdom in 19(d) of the Equality Act 2010 (UK). The United Kingdom's 'legitimate and proportionate' test has 2 limbs. First, that there is a legitimate reason for the discrimination, and second that the indirect discrimination can be justified if it is a 'proportionate means of achieving a legitimate aim'.[97] This could include consideration of less discriminatory alternatives and possible adjustments. The 'legitimate and proportionate' approach was recommended in the 2008 Senate Inquiry on the Sex Discrimination Act as well as by the Australian Human Rights Commission in its 2021 Position Paper.[98]

95 See *Sex Discrimination Act 1984* (Cth) s 7B(2); *Equal Opportunity Act 2010* (Vic) s 9(3); *Anti-Discrimination Act 1991* (Qld) s 11(2); *Discrimination Act 1991* (ACT) s 8(5).

96 Law Reform Commission of Western Australia, 'Review of the *Equal Opportunity Act 1984* (WA)', *Project 111 - Final Report,* 2022, pp 59–60; Queensland Human Rights Commission, 'Building belonging: Review of Queensland's *Anti-Discrimination Act 1991*', *Final Report*, 2022, pp 101–103.

97 Australian Human Rights Commission, *Free and Equal: A reform agenda for federal discrimination laws*, Australian Government, 2021, pp 296–297.

98 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, 'Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality', *Final Report*, Australian Government, 2008, pp xiii and 24–5; Australian Human Rights Commission, *Free and Equal: A reform agenda for federal discrimination laws,* Australian Government, 2021, p 297.

Table 2: Current definition of indirect discrimination and reform options

	Current definition	Reform options
Elements of indirect discrimination	• A requirement to comply with a condition, requirement or practice. • A requirement disadvantages people with disability. • A person does not or would not comply, or is not able or would not be able to comply with the condition. • It is not indirect discrimination if the condition, requirement or practice is reasonable. • Exception: Not indirect discrimination if avoiding discrimination would impose an unjustifiable hardship.	• A requirement to comply with a condition, requirement or practice. • A requirement disadvantages people with disability. • Not indirect discrimination if: - Option one: Avoiding discrimination would impose an unjustifiable hardship. - Option 2: Reasonable requirement or condition based on guiding factors. - Option 3: Requirement is legitimate and proportionate.

Other amendments - Removing 'does not or would not, or is not able or would not be able to' comply

This section of the paper discusses the requirement that a person is unable to comply with a requirement. Figure 2 below shows where the inability to comply element fits within the test for indirect discrimination within the Disability Discrimination Act.

Figure 2: Elements of indirect discrimination – inability to comply element

In addition to the Disability Royal Commission's recommendation, indirect discrimination in the Disability Discrimination Act could also be modernised by removing the inability to comply requirement. The inability to comply requirement provides that a person with disability 'does not or would not, or is not able or would not be able to' comply with a requirement or condition imposed upon them in order to satisfy the test for indirect discrimination.[99] While the Racial Discrimination Act contains a similar requirement, the Age Discrimination Act and Sex Discrimination Act do not include this requirement.[100] New South Wales, Queensland, Western Australia and South Australia have an element of 'not able to comply' in their legislation while Victoria, Tasmania, the Northern Territory and Australian Capital Territory do not.[101]

99 *Disability Discrimination Act 1992* (Cth) ss 6(1)(b) and 6(2)(b).
100 *Racial Discrimination Act 1975* (Cth) s 9(1A)(b).
101 *Anti-Discrimination Act 1977* (NSW) ss 49B(1)(b), 7(1)(c), 24(1)(b), 38B(1)(b)–(c), 39(1)(b), s 49T(1)(b), 49ZG(1)(b), 49ZYA(1)(b); *Anti-Discrimination Act 1991* (Qld) s 11(1)(b); *Equal Opportunity Act 1984* (WA) ss 66A(3)(c), 8(2)(c), 9(2)(c), 10(2)(c), 10A(2)(c), 35AB(3)(b)(iii), 35A(2)(c), 35O(3)(c), 36(2)(c), 53(2)(c), 66V(3)(c); *Equal Opportunity Act 1984* (SA) ss 66, 29(2)(b), 29(2a)(b), 29(3)(b), 29(4)(b), 51(b), 85A(b), 85T(2)(b), 85T(4)(b), 85T(6)(b), 85T(8)(b).

The Australian Human Rights Commission and Queensland Human Rights Commission have said that the inability to comply requirement is unnecessary and confusing.[102] Under the case law, this requirement is interpreted practically and more broadly than it appears on its face.[103] As such, it may confuse people who are not familiar with the case law and interpret the legislation literally. It has also been suggested that the 'disadvantage people with disability' requirement is already enough to capture evidence of an inability to comply.[104] The Australian Human Rights Commission and other stakeholders have expressed that removing the inability to comply requirement would simplify the definition of indirect discrimination.[105]

Consultation questions

7. How could the definition of indirect discrimination be amended to ensure that it is easy to understand and implement for people with disability and duty holders?
8. Should the reasonableness element in the definition of indirect discrimination be:
    a. removed
    b. retained and supplemented with a list of factors to consider
    c. replaced by a legitimate and proportionate test
    d. other

    Please expand on your response.
9. Should the language of 'does not or would not comply, or is not able or would not be able to comply' be removed from the definition of indirect discrimination?

102 Australian Human Rights Commission, *Free and Equal: An Australian Conversation on Human Rights*, Australian Government, 2021, pp 296–297; Queensland Human Rights Commission, 'Building belonging: Review of Queensland's *Anti-Discrimination Act 1991', Final Report*, 2022, pp 98–101.

103 See for example *Mandla v Dowell Lee* [1983] 2 AC 548; *Hurst v Queensland* (2006) 151 FCR 562 [134].

104 Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law,* Federation Press, 3rd edn, 2018, p 151; Queensland Human Rights Commission, 'Building belonging: Review of Queensland's *Anti-Discrimination Act 1991', Final Report,* 2022, p 98.

105 Australian Human Rights Commission, *Free and Equal: An Australian Conversation on Human Rights,* Australian Government, 2021, pp 296–297; Queensland Human Rights Commission, 'Building belonging: Review of Queensland's *Anti-Discrimination Act 1991', Final Report,* 2022, pp 98–101; Public Interest Advocacy Centre, Preliminary Submission in response to the NSWLRC Review of the *Anti-Discrimination Act 1977 (NSW)*, 13 October 2023, p 9.

Recommendations 4.33 and 4.34 – Interpreting the Disability Discrimination Act in line with the Convention on the Rights of Persons with Disabilities

Summary

- The Disability Discrimination Act is one of the key pieces of legislation through which the government fulfils its obligations under the Disabilities Convention.
- The Disability Royal Commission recommended that the Disability Discrimination Act include provisions stating that:
  - It is intended to give effect to Australia's obligations under the Disabilities Convention.
  - It must be interpreted in a way that is beneficial to people with disability, to the extent that it is possible to do so consistently with a number of international human rights law treaties, including the Disabilities Convention.
- We are seeking your views on whether the proposed amendments would better ensure that courts consider Australia's obligations under the Disabilities Convention when interpreting and applying the Disability Discrimination Act.

Discussion

The Disabilities Convention sets out Australia's international obligations to take legislative, administrative and other measures to respect, protect and fulfil the human rights of people with disability. Australia ratified the Disabilities Convention on 17 July 2008 and it entered into force for Australia on 16 August 2008.

The Disabilities Convention recognises a range of civil, political, economic, social and cultural rights.[106] The Disabilities Convention requires State Parties to ensure and promote the full realisation of all human rights and fundamental freedoms for all people with disability without discrimination of any kind on the basis of their disability. In Australia, the Disabilities Convention is incorporated through legislation, policy and programs at Commonwealth, state and territory levels. All governments are responsible for implementing the articles of the Disabilities Convention within their jurisdictions.

The Disability Discrimination Act, which predates the Disabilities Convention, did not originally refer to the Disabilities Convention in its objects and interpretation sections, although it is a key piece of legislation through which the government fulfils its obligations under the Disabilities Convention. In 2009, following ratification, a reference to the Disabilities Convention was added to both the interpretation section and the list of international instruments to which the limited application provisions of the Disability Discrimination Act give effect to, which provides an additional constitutional basis for certain provisions.[107]

106 Disability Royal Commission, 'Realising the human rights of people with disability', *Final Report,* 2023, Volume 4, p 44.
107 *Disability Discrimination Act 1992* (Cth) s 12.

The Disability Royal Commission recommended amendments to ensure that the Disability Discrimination Act is interpreted in a way that is beneficial to people with disability, to the extent it is possible to do so consistently with several international treaties. Implementing the Disability Royal Commission's recommendations would aim to ensure that when courts interpret and apply the Disability Discrimination Act, their interpretations are consistent with Australia's international human rights obligations regarding people with disability.[108] Similar provisions are already included in other Commonwealth Acts. For example, section 3 of the *Disability Services and Inclusion Act 2023* (Cth) specifies that one of the objects of the Act is to 'in conjunction with other laws, give effect to the Convention on the Rights of Persons with Disabilities.'[109]

We have heard that this amendment would have both symbolic and substantive impact for people with disability by clarifying and strengthening the link between the Disabilities Convention and the Disability Discrimination Act.

Interpretation of international treaties in Australian law

To an extent, Australian courts can already consider human rights principles in statutory interpretation through common law and the *Acts Interpretation Act 1901* (Cth) (Acts Interpretation Act). However, inserting new object and interpretation clauses to the Disability Discrimination Act could clarify and further support an interpretation consistent with the Disabilities Convention.

Common law

There is a common law presumption that courts should favour a statutory interpretation that is consistent with Australia's treaty obligations, such as under the Disabilities Convention. If it is clear that legislative provisions were written with Australia's treaty obligations in mind, the courts should favour the statutory interpretation that aligns with those obligations.[110]

Acts Interpretation Act 1901

The Acts Interpretation Act provides a range of rules for interpreting legislation, including that any treaties referred to in an Act can form part of the 'extrinsic material' that may be referred to and relied upon when interpreting legislation.[111] Given that the Disability Discrimination Act already refers to the Disabilities Convention, the courts can consider the Disabilities Convention when interpreting the meaning of provisions in the Disability Discrimination Act. However, this is up to the court to decide.

The Acts Interpretation Act also provides that when interpreting an Act, the interpretation that would best achieve the purpose or object of the Act is preferred (whether or not that purpose or object is expressly stated in the Act).[112] Therefore, amending the objects section of the Disability Discrimination Act could promote the interpretation of the Act in a way that is consistent with Australia's obligations under the Disabilities Convention.

Consultation questions

10. **Should the Disabilities Convention be included in the objects provision of the Disability Discrimination Act?**
11. **Should the Disability Discrimination Act be expressly required to be interpreted in a way that is beneficial to people with disability, in line with human rights treaties?**

108 Disability Royal Commission, 'Realising the human rights of people with disability', *Final Report,* 2023, Volume 4, p 213.
109 *Disability Services and Inclusion Act 2023* (Cth) s 3.
110 See for example Watts v Australian Postal Corporation (2014) 222 FCR 220 at [20].
111 *Acts Interpretation Act 1901* (Cth) s 15AB(2)(d).
112 *Acts Interpretation Act 1901* (Cth) s 15AA.

Part 2 – Positive duty to eliminate discrimination

Recommendations 4.27 and 4.28 – Positive duty for duty holders to eliminate discrimination

Summary

- In 2022, the Sex Discrimination Act was amended to introduce a positive duty on employers and 'persons conducting a business or undertaking' to eliminate sexual harassment and sex discrimination in connection with work, as far as possible. The Disability Discrimination Act does not currently impose any duties on duty holders to take steps to proactively eliminate disability discrimination.
- The Disability Royal Commission recommended the introduction of a positive duty on all duty holders, including public and private sector entities, modelled on the duty in the Sex Discrimination Act.
- A positive duty is intended to shift the emphasis from a reactive, complaints-based model to one where duty holders are required to proactively assess their compliance with their obligations and ensure people with disability are not being subjected to discrimination.
- A positive duty would require the duty holder to take reasonable and proportionate measures to eliminate, as far as possible, discrimination against people with disability and would enable a third party (the Australian Human Rights Commission) to act if the duty holder is not taking appropriate steps to address discrimination.
- The size of a duty holder's business or operations, and resources, would be taken into account in determining whether a measure is reasonable and proportionate.
- We are seeking your feedback on how a positive duty could be implemented in the Disability Discrimination Act, including reflecting on the experience with the positive duty under the Sex Discrimination Act, to ensure the duty is effective in addressing and preventing disability discrimination.

Discussion

A positive duty to protect people with disability, as well as other protected attributes, from discrimination, harassment and vilification has been implemented in various pieces of federal, state and territory legislation in recent years. Positive duty provisions now exist in the *Anti-Discrimination Act 1992* (NT), *Discrimination Act 1991* (ACT) and the *Equal Opportunity Act 2010* (Vic). Further detail about these provisions in state and territory discrimination legislation can be found in table 3. The implementation of positive duty provisions in state and territory legislation demonstrates that this is the new standard being adopted across Australia to improve the prevention of discrimination. As a result of these developments, duty holders in a large portion of the country are already familiar with and subject to these kinds of obligations.

In 2022, the Australian Government introduced a positive duty in the Sex Discrimination Act that requires employers and people conducting a business or undertaking to take reasonable and proportionate steps to eliminate, as far as possible, sex discrimination, sexual harassment and related unlawful conduct occurring in connection with work, as far as possible.[113] The positive duty is enforced by the Australian Human Rights Commission, who was provided with a suite of regulatory powers in the Australian Human Rights Commission Act to enforce compliance, including the ability to issue compliance notices and enter into enforceable undertakings.

In contrast, the Disability Discrimination Act does not include a positive duty for duty holders to prevent and address discrimination against people on the ground of disability. Under state and territory workplace health and safety laws, employers currently already have a duty to prevent risks to the health and safety of workers and others impacted by their work, including managing the risk of exposure to discriminatory conduct. The Disability Discrimination Act also requires equal protection of health and safety for people with disability at work. Therefore, similar obligations arise under the Disability Discrimination Act and under occupational health and safety legislation.

The Disability Royal Commission recommended that a positive duty in the Disability Discrimination Act should extend to eliminating all forms of disability discrimination, including harassment and victimisation, and that it be based on the amendments to the Sex Discrimination Act. Notably, the Disability Royal Commission recommended that the positive duty apply to all duty holders under the Disability Discrimination Act. This differs from the duty in the Sex Discrimination Act, which was tailored to workplaces and applies only to employers and people conducting a business or undertaking, which includes many types of modern working arrangements and structures, including contractors, franchisors, sole traders and self-employed people, but is still focused on work.[114]

The Disability Royal Commission's recommendation for a positive duty would require duty holders to take reasonable and proportionate measures to eliminate disability discrimination, as far as possible. The recommendation provides that the size of a person's business or operations, and a person's resources, should be taken into account when determining whether a measure is reasonable and proportionate.[115] This aligns with the positive duty in the Sex Discrimination Act.[116] This means that the measures that a small business would be required to take would likely be different to and less than those of a large corporation. For example, the owner of a smaller business may be required to develop a short policy on disability discrimination and harassment, including a complaint handling process. They should then discuss this policy with their staff, and ensure they are having regular discussions with them, including providing the opportunity for any behavioural issues or complaints to be raised. Alternatively, a larger organisation may be required to implement a broad strategic plan in relation to disability discrimination, including confidential staff surveys, data collection on complaints, regular reviews of existing policies and procedures, and mandatory training for managers and new staff on harassment and discrimination.

113 *Sex Discrimination Act 1984* (Cth) s 47C.
114 *Sex Discrimination Act 1984* (Cth) s 47C.
115 Disability Royal Commission, 'Realising the human rights of people with disability', *Final Report,* 2023, Volume 4, p 315.
116 *Sex Discrimination Act 1984* (Cth) s 47C.

The proposed introduction of a positive duty is designed to assist in preventing discrimination from occurring, rather than relying on complaints being put forward by people with disability to remedy the discrimination after it has occurred. In one of the public hearings during the Disability Royal Commission's consultations, Blind Citizens Australia expressed that the 'primary difficulty at present is that the [Disability Discrimination Act] is used on a case-by-case basis, to test discrimination claims, rather than providing adequate protection in the first instance which may prevent the discrimination from occurring'.[117]

The Disability Royal Commission's recommendation aims to shift the emphasis of the anti-discrimination framework from a reactive, complaints-based model to one where duty holders are required to proactively and continuously assess their compliance with their obligations to ensure people with disability are not being subject to discrimination or harassment. Currently, under the Disability Discrimination Act, complaints are initiated by the person experiencing discrimination. This means that the protection of a person's rights depends on that person being prepared to make and pursue a complaint of disability discrimination in the Australian Human Rights Commission, and potentially the courts. The introduction of a positive duty would amend this by enabling a third party (in this case, the Australian Human Rights Commission) to enforce the law if a duty holder is not complying with the duty.

Numerous reviews and inquiries into Australian anti-discrimination legislation have recommended changes to both Commonwealth and state and territory anti-discrimination legislation to include a positive duty.[118] Most reviews, as demonstrated in table 3 below, have resulted in amendments to the relevant legislation to add positive duty provisions.

Table 3: Anti-discrimination legislation containing positive duty requirements

State/Territory	Legislation	Positive duty description
Northern Territory (NT)	*Anti-Discrimination Act 1992* (NT)	In 2017, the Northern Territory Department of the Attorney-General and Justice commenced a review of the Northern Territory's Anti-Discrimination Act, publishing a discussion paper that year.[119] In February 2022, the Northern Territory Government tabled a paper *Equal Opportunity in the Northern Territory*, which committed to amending the Act to introduce a positive duty.[120] As of January 2024, the Northern Territory Anti-Discrimination Act includes a positive duty that requires a person to take reasonable and proportionate measures to eliminate discrimination (including disability), sexual harassment and victimisation to the greatest extent possible.[121]

117 Blind Citizens Australia, *Submission in response to the Disability Royal Commission 'Safeguards and Quality' Issues Paper*, February 2021, ISS.001.00560_01, p 8.

118 Queensland Human Rights Commission, 'Building belonging: Review of Queensland's *Anti-Discrimination Act 1991*', *Final Report,* July 2022; Department of the Attorney-General and Justice (Northern Territory) and Northern Territory Government, 'Modernisation of the Anti-Discrimination Act', Discussion Paper, September 2017; ACT Law Reform Advisory Council, 'Review of the *Anti-Discrimination Act 1991* (ACT)', *Final Report*, 2015; Victoria Department of Justice, 'An Equality Act for a Fairer Victoria', *Equal Opportunity Review* Final Report, June 2008; Law Reform Commission of Western Australia, 'Review of the *Equal Opportunity Act 1984* (WA)', *Project 111 - Final Report*, 2022.

119 Department of the Attorney-General and Justice (Northern Territory) and Northern Territory Government, Modernisation of the *Anti-Discrimination Act*, Discussion Paper, September 2017.

120 Northern Territory Government, *Achieving Equality in the Northern Territory*, Northern Territory Government, 2022, p 10.

121 *Anti-Discrimination Act 1992* (NT) s 18B.

State/Territory	Legislation	Positive duty description
Australian Capital Territory (ACT)	*Discrimination Act 1991* (ACT)	The ACT Law Reform Advisory Council conducted a review of the Discrimination Act and produced a final report in 2015. The report included 3 recommendations relating to the introduction of a positive duty to eliminate discrimination.[122] The recommendations were implemented in the Discrimination Act and came into effect in September 2024, imposing a positive duty on an organisation, business or any individual with organisational management responsibility to take reasonable and proportionate steps to eliminate discrimination (including on the ground of disability), sexual harassment and unlawful vilification.[123]
Victoria	*Equal Opportunity Act 2010* (VIC)	The Equal Opportunity Act was the subject of a review by Mr Julian Gardner in 2008, to which the Victorian Government responded with 2 stages of reform. The second stage of reform introduced a positive duty on all organisations covered by the Act to take reasonable, proportionate and proactive steps towards eliminating discrimination.[124] Section 15 of the Equal Opportunity Act states that organisations have a positive duty to eliminate discrimination (including on the ground of disability), sexual harassment, and victimisation as far as possible.[125] The positive duty is applicable to everyone who already has responsibilities as determined by the Victorian Equal Opportunity Act, including employers, clubs and sporting organisations and providers of accommodation, education or goods and services.

In Western Australia, a positive duty is under development. The 2022 review of the Equal Opportunity Act by the Law Reform Commission of Western Australia made 12 recommendations relating to the implementation of a positive duty, including that duty holders must take reasonable and proportionate measures to eliminate discrimination, harassment, victimisation and vilification.[126] It also specified that such a duty should apply to all areas protected under the Equal Opportunity Act. At present, a positive duty is yet to be introduced in the Equal Opportunity Act. However, following the introduction of a positive duty into the Commonwealth Sex Discrimination Act, the push to include a positive duty in the Equal Opportunity Act has increased once again.[127]

Positive duties are also prevalent in international anti-discrimination legislation. A positive duty was established in the Irish Human Rights and Equality Commission Act 2014 (Ireland), the Equality Act 2010 (UK), and the Employment Equity Act 1995 (Canada).

122 ACT Law Reform Advisory Council, 'Review of the *Anti-Discrimination Act 1991* (ACT)', *Final Report*, 2015, p 12.
123 *Discrimination Act 1991* (ACT) s 75.
124 Victoria Department of Justice, 'An Equality Act for a Fairer Victoria', *Equal Opportunity Review Final Report,* June 2008, p 37.
125 *Equal Opportunity Act 2010* (Vic) s 15.
126 Law Reform Commission of Western Australia, 'Review of the *Equal Opportunity Act 1984* (WA)', *Project 111 - Final Report,* 2022.
127 Law Reform Commission of Western Australia, 'Review of the *Equal Opportunity Act 1984* (WA)', *Project 111 - Final Report,* 2022.

Box 13: Hypothetical example of how a duty holder could uphold a positive duty

A positive duty would require the duty holder to take reasonable and proportionate measures to eliminate, as far as possible, discrimination against people with disability. It could be modelled on the current duty under the Sex Discrimination Act, with the expectation that duty holders will take steps to meet this requirement, depending on:

- the size, nature and circumstances of the duty holder's business or undertaking
- the duty holder's resources, whether financial or otherwise
- the practicability and the cost of measures to eliminate conduct
- any other relevant matter.[128]

The Australian Human Rights Commission's guidance on the positive duty in the Sex Discrimination Act gives an example of how this would apply in employment.[129]

Some examples of a positive duty being met in the context of education settings may be:

- establishing and publishing enrolment and disciplinary policies
- ensuring educators have appropriate training
- proactive identification of student requirements and adapting teaching styles and resources
- adjusting assessment processes or conditions[130]
- providing supports to ensure wellbeing and social inclusion
- providing modified schedules to provide students with flexibility to attend medical appointments
- providing assistive technology, including screen readers, for students with sensory disability.

These measures should not rely on a request being made by a person with disability but rather be proactively introduced or available, for example, within the policy of the duty holder or education system more broadly.

Consultation questions

12. If there was a positive duty in the Disability Discrimination Act, who should it apply to?
13. Are there lessons from the operation of the positive duty in the Sex Discrimination Act that could be incorporated into a positive duty in the Disability Discrimination Act?
14. What costs, benefits and other impacts would duty holders experience in meeting a positive duty under the Disability Discrimination Act? If you are an existing duty holder under the Disability Discrimination Act, please specify how you think meeting a positive duty would impact you.
15. Should there be exceptions or limits to the application of a positive duty?

128 Australian Human Rights Commission, *Factsheet Series: Positive Duty – What is the Positive Duty*, Australian Human Rights Commission website, October 2023, accessed 27 November 2024.

129 Australian Human Rights Commission, *Factsheet Series: Positive Duty – What is the Positive Duty*, Australian Human Rights Commission website, October 2023, accessed 27 November 2024.

130 The decision in *Sklavos v Australasian College of Dermatologists* (2017) 256 FCR 247 related to exam conditions set by a qualifying body. Potential amendments to the definition of indirect discrimination which would address concerns raised about the Sklavos decision are discussed in Part 1 of this Issues Paper.

Part 3 – Encouraging inclusion of people with disability in employment, education and other areas of public life

Recommendations 4.25 and 4.26 – Strengthening the duty to provide adjustments

Summary

- The Disability Discrimination Act requires duty holders, such as employers, to provide a person with disability with any reasonable adjustments required to support their participation. An adjustment is not reasonable if it would impose unjustifiable hardship on the duty holder.
- The Disability Royal Commission recommended:
  - replacing references to 'reasonable adjustments' with 'adjustments'
  - creating a 'stand-alone duty to provide adjustments' to make it unlawful for a duty holder to fail or refuse to make an adjustment unless making the adjustment would impose unjustifiable hardship.[131]
- The Disability Royal Commission recommended that the stand-alone duty should apply 'generally to all contexts and settings'.[132]
- We are seeking your views on whether the recommended amendments would effectively simplify the reasonable adjustment provisions and provide sufficient certainty. We are also seeking your views on the possible scope of the stand-alone duty.

Discussion

Changing the term 'reasonable adjustments'

Section 4 of the Disability Discrimination Act currently defines reasonable adjustment as:

> ***Reasonable adjustment:*** an adjustment to be made by a person is a ***reasonable adjustment*** unless making the adjustment would impose an unjustifiable hardship on the person.

The Disability Royal Commission observed that there is a misconception that a 'reasonable adjustment' is an adjustment that is both reasonable and does not cause unjustifiable hardship.[133] The confusion may suggest to duty holders, such as employers, that they should consider whether a potential adjustment is 'reasonable' in the circumstances before considering whether the adjustment would impose unjustifiable hardship. There is also the risk that duty holders may believe that they need to apply a 'reasonable person test' when determining whether an adjustment could or should be made.

131 Disability Royal Commission, 'Realising the human rights of people with disability', *Final Report,* 2023, Volume 4, p 30.
132 Disability Royal Commission, 'Realising the human rights of people with disability', *Final Report,* 2023, Volume 4, p 309.
133 Disability Royal Commission, 'Realising the human rights of people with disability', *Final Report,* 2023, Volume 4, p 309.

To address these misconceptions, the Disability Royal Commission recommended that the Disability Discrimination Act be amended to replace all references to 'reasonable adjustments' with 'adjustments'. This would streamline the legislative test and clarify that the only consideration for duty holders is whether making an adjustment would impose an unjustifiable hardship.[134] Removing 'reasonable' will bring the provisions into line with how the courts have interpreted the law on providing adjustments currently. The courts have already recognised that the term 'reasonable adjustments' means all adjustments up until the point of unjustifiable hardship. There is no scope for courts or duty holders to assess the 'reasonableness' of an adjustment outside the context of unjustifiable hardship.[135]

For consistency, the term 'reasonable adjustment' would also be changed to 'adjustment' in other sections of the Disability Discrimination Act. For example, the concept of 'reasonable adjustments' is relevant in determining whether a person can meet the inherent requirements of particular work (discussed later in this Part).

Stand-alone duty to make adjustments

When the reasonable adjustment provisions were introduced in 2009, the intention was to place a duty on duty holders to take practical steps to address disadvantage experienced by people with disability.[136] However, the Disability Royal Commission found that the reasonable adjustment provisions in the Disability Discrimination Act are not operating as a 'duty' in practice. For example:

- In employment contexts, the Disability Royal Commission heard that people with disability find it difficult to have discussions with their employers about the adjustments they may need, and the onus to start the discussion about adjustments often 'falls at the feet of the person with disability'.[137]
- In the education sector, the Disability Royal Commission heard that the reasonable adjustments provisions are not well understood and schools are not agreeing to adjustments requested by parents, students or allied health practitioners.[138] The Disability Royal Commission also heard that many teachers have a positive attitude towards inclusion but need more planning time, training, and resources.[139]

The Disability Royal Commission also noted that the courts' interpretations of the reasonable adjustment provisions have not realised the intended purpose of the Disability Discrimination Act.[140] For example, the courts have stated that the drafting of the reasonable adjustment provisions does not impose a 'positive obligation' on the discriminator.[141]

134 Disability Royal Commission, 'Realising the human rights of people with disability', *Final Report,* 2023, Volume 4, p 309.
135 *Watts v Australian Postal Corporation* (2014) 222 FCR 220 [22].
136 Explanatory Memorandum, Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008 (Cth), pp 7–9.
137 Disability Royal Commission, 'Inclusive education, employment and housing', *Final Report,* 2023, Volume 7, Part B, p 392.
138 Disability Royal Commission, 'Inclusive education, employment and housing', *Final Report,* 2023, Volume 7, Part A, pp 95–96.
139 Disability Royal Commission, 'Inclusive education, employment and housing', *Final Report,* 2023, Volume 7, Part A, p 180.
140 Disability Royal Commission, 'Realising the human rights of people with disability', *Final Report,* 2023, Volume 4, p 307.
141 *Watts v Australian Postal Corporation* (2014) 222 FCR 220 [233].

Sklavos

The majority judgment in the Sklavos decision interpreted the duty to provide reasonable adjustments such that, in order to establish direct discrimination, people with disability must prove that their disability is the reason for the failure to make reasonable adjustments.[142] For example, if a person has low vision and requests software to assist them to undertake their work, they must show that the failure to provide that software is because they have low vision. While a person's disability will be the reason a person needs an adjustment, it may not be the reason for the other party failing or refusing to provide adjustments. Cost or inconvenience are likely to be the barrier in many instances. The result is that the requirement to make reasonable adjustments will only apply in very limited circumstances.

The Sklavos decision also means that people with disability are unable to establish indirect discrimination if a specific requirement or condition imposed on them is 'reasonable' in the circumstances. The Sklavos interpretation is that no matter how small, easy or inexpensive an adjustment may be, there is no obligation for the duty holder to provide it if the requirement or condition imposed on the person with disability is reasonable.

The Disability Royal Commission recommended changes to the operation of the existing duty following the Sklavos decision. It recommended that the duty be amended to expressly provide that it is unlawful for a duty holder, such as an employer, to fail or refuse to make an adjustment unless making the adjustment would impose an unjustifiable hardship. The Disability Royal Commission concluded that a stand-alone duty would shift the courts' focus to whether an adjustment would impose an unjustifiable hardship on a duty holder.

The duty to provide adjustments would be different from the recommendation to implement a positive duty to eliminate disability discrimination (see Part 2).[143] The positive duty would require a duty holder to proactively take steps to eliminate and address disability discrimination and would enable a third party (the Australian Human Rights Commission) to act if the duty holder is not taking appropriate steps to address discrimination. Conversely, the proposed stand-alone duty to provide adjustments would operate to clarify the obligations on duty holders and provide a specific ground for people with disability to make a discrimination complaint if a duty holder fails or refuses to make such adjustments.

Scope of the proposed stand-alone duty

The Disability Royal Commission argued that the scope of the stand-alone duty should not be confined to the particular areas or settings currently covered by the Disability Discrimination Act and other anti-discrimination Acts. Instead, they proposed that the duty should have 'broad application' and apply generally to all contexts and settings, if and when a person with disability may require adjustments.[144] If the proposed duty to make adjustments extended beyond the existing scope of the Disability Discrimination Act, it could cover areas of personal or 'private' life, such as private interactions in public places or within a person's home.

142 *Sklavos v Australasian College of Dermatologists* (2017) 256 FCR 247.
143 Disability Royal Commission, 'Realising the human rights of people with disability', *Final Report,* 2023, Volume 4, pp 30–31.
144 Disability Royal Commission, 'Realising the human rights of people with disability', *Final Report,* 2023, Volume 4, p 309.

Anti-discrimination legislation has traditionally been concerned with regulating 'public' activities, such as work, education, the provision of goods and services, the provision of accommodation and public administration. The Productivity Commission has previously considered proposals to extend the scope of anti-discrimination law to the private sphere. It noted that the Disability Discrimination Act is focused on eliminating discrimination and promoting substantive equality of opportunity and it may not be practical or feasible for anti-discrimination law to go beyond these objects.[145,146]

It is possible that imposing a stand-alone duty may cause issues where a person with disability chooses not to disclose their disability, which they do not have to do. A broadly framed duty may result in uncertainty and confusion for duty holders who may not be aware that a person has a disability and therefore the type of adjustments that could be made. The duty will need to ensure that duty holders are not responsible for circumstances outside their knowledge or control.

Consultation questions

16. **Would the creation of a stand-alone duty to provide adjustments better assist people with disability and duty holders to understand their rights and obligations?**
17. **Should the scope of the duty to provide adjustments apply only to the existing areas of public life covered by the Disability Discrimination Act, or extend to other contexts?**
18. **Would removing the word 'reasonable' from the term 'reasonable adjustments' to align the language with the legal effect create any unintended consequences?**

145 Australian Government Productivity Commission, 'Review of the *Disability Discrimination Act 1992*', *Productivity Commission Inquiry Report*, Volume 1, 2004, p 182.

146 Australian Government Productivity Commission, 'Review of the *Disability Discrimination Act 1992*', *Productivity Commission Inquiry Report*, Volume 1, 2004, p 182.

Recommendation 4.32 – Definition of and considerations for unjustifiable hardship

Summary

- The Disability Discrimination Act provides that a duty holder is not required to make reasonable adjustments for a person with disability if the adjustments would impose unjustifiable hardship.
- The Disability Royal Commission recommended that 2 additional factors should be taken into consideration when deciding whether a specific adjustment would impose unjustifiable hardship on duty holders, such as an employer or school. These factors are:
  - how much the person with disability has been consulted
  - what alternative options were available to remove or reduce hardship.
- We are seeking your views on the preferred approach to ensuring duty holders consult and consider all options to make adjustments before claiming unjustifiable hardship.

Discussion

The Disability Discrimination Act currently provides that a duty holder is not required to make reasonable adjustments for a person with disability if the adjustments would impose unjustifiable hardship. The Disability Discrimination Act provides that the all relevant circumstances of a particular case should be considered when determining whether an adjustment would impose unjustifiable hardship, including the following factors:

- benefit or detriment to any person concerned
- the effect of the disability
- the financial circumstances, and likely expenditure
- the availability of financial and other assistance, or
- any relevant action plans.[147]

The courts have varied in their acceptance of claims of unjustifiable hardship, considering various relevant factors. In applying the test, the courts have often considered the financial cost of supplying the extra services and facilities, and hardship to the dutyholder and others (including the community) in accommodating the person with disability.[148] In educational contexts, the courts have also considered the potential impact on the broader student body and school environment under 'detriment to any person concerned' in addition to financial considerations.[149]

147 *Disability Discrimination Act 1992* (Cth) s 11.

148 See for example *Purvis v New South Wales (Department of Education and Training)* (2003) 217 CLR 92; *King v Jetstar Airways Pty Ltd (No 2)* [2012] FCA 8.

149 See for example *Purvis v New South Wales (Department of Education and Training)* (2003) 217 CLR 92; *Hills Grammar School v Human Rights & Equal Opportunity Commission* [2000] FCA 658.

The current unjustifiable hardship provision does not require duty holders, such as employers, to consult with a person with disability about what they need or what adjustments may help them. This means that duty holders, such as employers, may make decisions without understanding the person with disability's situation as a whole or considering the full scope of the impact on the person with disability.

Duty holders are also not explicitly required to keep records or show proof of what they considered in claiming unjustifiable hardship under the Disability Discrimination Act. However, in practice the courts have and do evaluate evidence of what the respondent considered under 'all relevant circumstances' in order to assess respondents' claims of unjustifiable hardship.[150]

In light of these concerns, the Disability Royal Commission recommended that additional factors should be taken into account when deciding whether the making of a specific adjustment would impose unjustifiable hardship on duty holders, such as an employer or school. These factors are:

- how much the person with disability has been consulted
- what alternative options were available to remove or reduce hardship.

The Disability Royal Commission also recommended requiring duty holders to document factors they considered, and give reasons for claiming unjustifiable hardship.[151]

The inclusion of additional factors to be considered in applying the unjustifiable hardship test may encourage greater engagement between duty holders and people with disability and help ensure that any decisions are informed by accurate advice about the person's situation and the particular adjustments that they may require.

The introduction of a requirement to make and retain detailed documentation may also increase accountability and transparency in the process of assessing unjustifiable hardship. However, the implementation and development of specific requirements would need to consider the size and resources of the organisation or business, noting that smaller organisations may have reduced human resources capacity and expertise.

150 See for example *King v Jetstar Airways Pty Ltd (No 2)* [2012] FCA 8; *Williams v Commonwealth* [2002] FMCA 89; *Hills Grammar School v Human Rights & Equal Opportunity Commission* [2000] FCA 658.

151 Disability Royal Commission, 'Realising the human rights of people with disability', *Final Report*, 2023, Volume 4, p 337.

Alternative implementation: A new definition of unjustifiable hardship

The Disability Royal Commission also discussed the need to clarify the factors that should be considered when applying the unjustifiable hardship test and how they should be weighed and balanced. An alternative option to implement this recommendation is to draft a new definition of unjustifiable hardship that provides greater clarity for people with disability and duty holders alike. For example, one option is to clarify that a hardship would only be considered unjustifiable if the benefits of making the adjustment are outweighed by the potential cost and detriment to others. This test would require the courts to assess and balance the benefits to the person with disability alongside the cost and detriment to the duty holder. The net benefit to the community or the potential detriment to other community members may be relevant considerations.

This approach could provide a clearer unjustifiable hardship test, in line with the Productivity Commission's 2004 recommendations. The Productivity Commission considered that the unjustifiable hardship defence requiring 'that the benefits and detriments to all persons concerned be considered' is a safeguard in the Disability Discrimination Act that may not apply sufficiently widely. The Productivity Commission recommended an appropriate balance be kept between requirements and safeguards to continue to provide net benefits to the community.[152]

Table 4: Unjustifiable hardship options

Option 1: DRC recommendation	**Option 2: Alternative definition**
Include additional factors that must be taken into account: ● consultation with any person with disability concerned ● consideration of available alternative measures to eliminate or reduce hardship. Respondents are to document factors they considered in assessing hardship.	Have a new definition of unjustifiable hardship, for example: where the benefit to the person and community would be outweighed by the detriment and cost to any person concerned. This definition could include a requirement for the respondent claiming unjustifiable hardship to have consulted with the person with disability.

Consultation questions

19. What is your preferred approach to achieving greater fairness and transparency in claims of unjustifiable hardship:
    a. the Disability Royal Commission amendment as proposed
    b. a new definition of unjustifiable hardship
    c. other

    Please expand on your response.

152 Australian Government Productivity Commission, 'Review of the *Disability Discrimination Act 1992*', *Productivity Commission Inquiry Report,* Volume 1, 2004, p XXVIII.

Recommendation 7.26 – Expanding the factors considered by employers when determining if an employee can carry out the inherent requirements of particular work

Summary

- The Disability Discrimination Act provides an exception to unlawful discrimination in employment if an employer can establish that a person with disability is unable to perform the 'inherent requirements' of particular work.[153]
- The Disability Royal Commission recommended the Disability Discrimination Act be amended to include 2 additional factors that must be considered in determining whether a prospective or existing employee would be able to carry out the inherent requirements of particular work:
  - the nature and extent of any adjustments made
  - the extent of consultation with any person with disability concerned.
- We are seeking your views on whether the inclusion of these factors would improve decision-making by employers. We are also seeking your views on whether there are other factors that could be included to promote clarity around the operation of this exemption and reduce barriers for people with disability in employment.

Discussion

The Disability Discrimination Act provides an exception to unlawful discrimination in employment if an employer can establish that a person with disability is unable to perform the 'inherent requirements' of particular work.[154] This means that discrimination in employment is not unlawful if a person with disability does not meet the inherent requirements of a position, even with adjustments in place, or could only meet the inherent requirements with the aid of adjustments that would cause the employer unjustifiable hardship.

153 *Disability Discrimination Act 1992* (Cth) s 21A. Note: the *Age Discrimination Act 2004* (Cth) also contains provisions related to inherent requirements, see: *Age Discrimination Act 2004* (Cth) ss 18(4), 19(3), 20(2), 21(4), 22(2) and 24(2).

154 *Disability Discrimination Act 1992* (Cth) s 21A. Note: the *Age Discrimination Act 2004* (Cth) also contains provisions related to inherent requirements, see: *Age Discrimination Act 2004* (Cth) ss 18(4), 19(3), 20(2), 21(4), 22(2) and 24(2).

Box 14: Meaning of 'inherent requirements'

'Inherent requirements' is not a defined term in the Disability Discrimination Act. It is taken to mean the qualifications, skills, tasks, and the way in which tasks must be performed, that are essential for a job, having regard to the nature of the employer's organisation or business. It could include duties in an emergency, as well as temporary higher duties, depending on the particular work.

Key factors to identify if a requirement is inherent

Identifying 'inherent requirements' starts with the terms and conditions of employment.[155] This process should consider what an employee must do and the circumstances in which the employment is completed.[156] An employee must be able to perform these requirements safely.

There are no requirements for an employer to advertise the inherent requirements of a job, or to consult with a prospective or existing employee before deciding whether they are able to meet the inherent requirements of particular work.[157] An employer is also not required to inform an applicant as to whether any reasonable adjustments will be made to assist them to meet those requirements, or whether the employer considered any adjustments prior to determining that an applicant could not complete the work.[158]

The Disability Royal Commission highlighted that the current operation of the inherent requirements exception acts as a barrier to employment for people with disability, and that the lack of clarity around inherent requirements can discourage people with disability from applying for roles.[159] It was also noted that the current approach does not encourage employers to engage in discussions with prospective or existing employees about job design or the scope of adjustments that could be made.

The Disability Royal Commission observed that the concept of 'inherent requirements' is difficult for prospective or existing employees to understand and apply:

> Private employers' policies and procedures provided … contained little substantive information about inherent requirements. Some policies did no more than describe the statutory test … substantive information might include how the requirements are determined and assessed, the relationship between work health and safety requirements, and when and how adjustments should be made to enable a person to perform the inherent requirements.[160]

155 *X v Commonwealth* (1999) 200 CLR 177, 209 [105]–[106].
156 *X v Commonwealth* (1999) (Cth) 200 CLR 177, 209 [105]–[106].
157 Disability Royal Commission, 'Inclusive education, employment and housing', *Final Report,* 2023, Volume 7, Part B, p 389.
158 Disability Royal Commission, 'Inclusive education, employment and housing', *Final Report,* 2023, Volume 7, Part B, p 389.
159 Disability Royal Commission, 'Inclusive education, employment and housing', *Final Report,* 2023, Volume 7, Part B, p 389.
160 Disability Royal Commission, 'Inclusive education, employment and housing', *Final Report,* 2023, Volume 7, Part B, p 390.

Employers can also face significant difficulty in attempting to determine when a person's disability may be relevant to inherent requirements. In practice, distinguishing between the inherent and the non-essential requirements of a particular position can be difficult and requires detailed understanding of the duties involved in each specific job in a workplace. For example, the ability to perform certain duties in an emergency may be an inherent requirement for airline cabin personnel, but not for the sales staff who work for the same company.[161] The identification of inherent requirements may be particularly challenging for small businesses or if a role is newly established.

To address these concerns, the Disability Royal Commission recommended that 2 additional factors be inserted into the Disability Discrimination Act to specify that the 'nature and extent of any adjustments made' and the 'extent of consultation with any person with disability concerned' must be considered in determining whether a prospective or existing employee would be able to carry out the inherent requirements of particular work.[162]

The Disability Royal Commission observed that a person with disability is uniquely able to consult with their employer on how they may personally complete work or use adjustments to thrive in a role.[163] These amendments are intended to encourage consultation between employers and prospective or existing employees about the potential adjustments available and how these may relate to the requirements of the position, before employment decisions are made. This is to ensure that people with disability are appropriately included in the process for making employment decisions, and that these decisions are based on accurate information, rather than assumptions or bias.

It is also important to consider the impacts that the proposed amendment may have on people with disability. Any consultation that does occur with employers would likely require people with disability to share their personal health information. This could raise concerns for people with disability, as they may not want to disclose this information to their employer, including for fear of discrimination, or they may have concerns that their employer is not appropriately handling this information.[164]

Guidelines

The Productivity Commission's 2004 review observed that while a statutory definition of 'inherent requirements' could be introduced:

> The most practical and effective approach would be to address, in guidelines, the factors that might be taken into account when identifying inherent requirements. This would enable a reasonably detailed approach to be taken in providing background material that could be applied on a case by case basis. It would also be flexible to allow for changing circumstances.[165]

161 Australian Government Productivity Commission, 'Review of the *Disability Discrimination Act 1992*', *Productivity Commission Inquiry Report,* Volume 1, 2004, p 218.
162 Disability Royal Commission, 'Inclusive education, employment and housing', *Final Report,* 2023, Volume 7, Part B, p 438.
163 Disability Royal Commission, 'Inclusive education, employment and housing', *Final Report,* 2023, Volume 7, Part B, p 391.
164 *Disability Royal Commission,* 'Inclusive education, employment and housing', *Final Report,* 2023, Volume 7, Part B, p 383.
165 Australian Government Productivity Commission, 'Review of the *Disability Discrimination Act 1992', Productivity Commission Inquiry Report,* Volume 1, 2004, p 220.

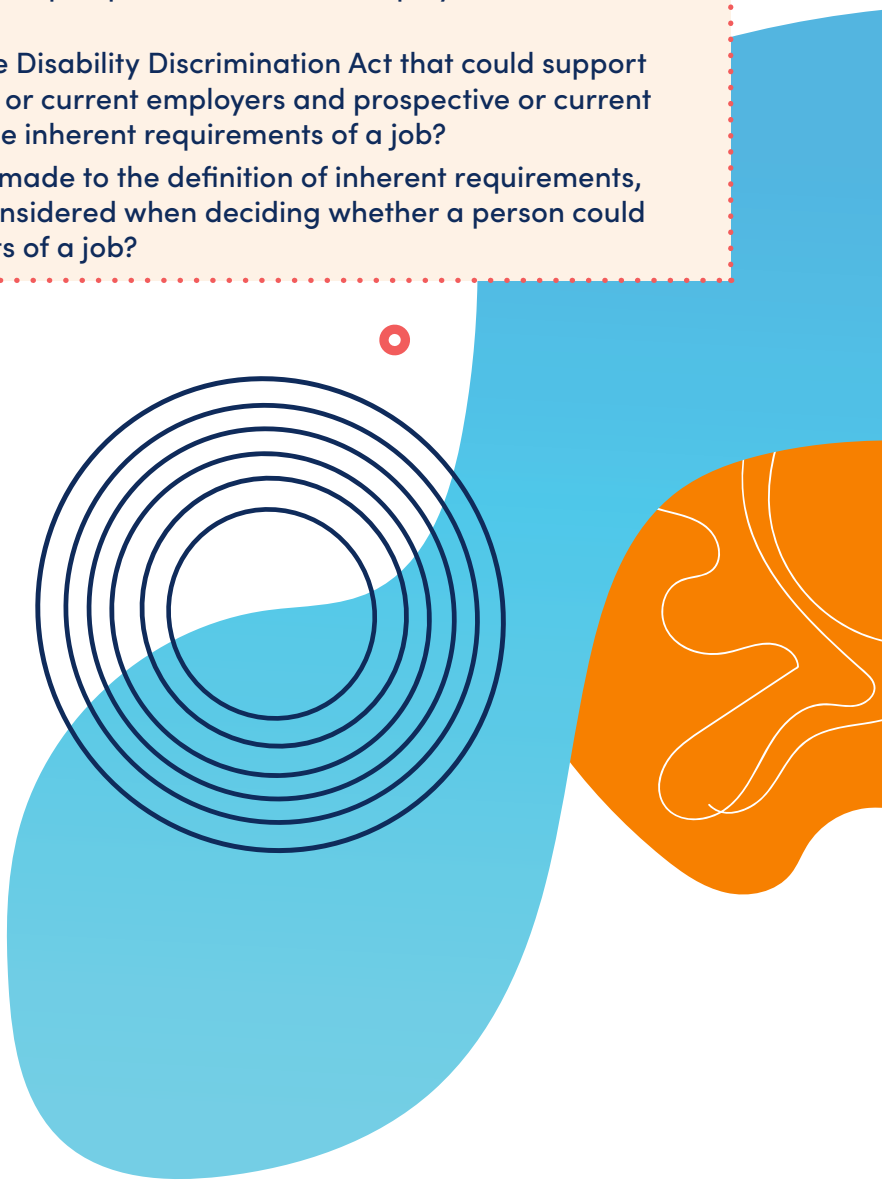
Guidelines may help ensure that there is consistency and flexibility in the assessment of inherent requirements across different workplaces, and could provide tools for self-assessment for employers.

Interactions with other legislation

The inherent requirements provision in the Disability Discrimination Act overlaps with other legislative obligations, which can increase complexity for both employees and employers when considering this exception. For example, the Fair Work Act has a similar exception to unlawful discrimination regarding the inherent requirements of a position.[166] However, under the Fair Work Act, there is no requirement to make reasonable adjustments for a person with disability before an assessment is made about whether they can meet the inherent requirements of a particular position.

Consultation questions

20. **What are your views on amending the Disability Discrimination Act to consider the nature and extent of any adjustments made and encourage consultation between prospective or current employers and prospective or current employees before making employment decisions?**
21. **Are there other amendments to the Disability Discrimination Act that could support engagement between prospective or current employers and prospective or current employees to better understand the inherent requirements of a job?**
22. **Should any other amendments be made to the definition of inherent requirements, including factors that should be considered when deciding whether a person could carry out the inherent requirements of a job?**



166 *Fair Work Act 2009* (Cth) s 351(2)(b).

Recommendation 7.2 – Exclusionary discipline and suspension

Summary

- Section 22(2) of the Disability Discrimination Act makes it unlawful for an educational institution to discriminate against a student on the grounds of their disability by:
  - denying or limiting their access to a benefit
  - expelling them
  - subjecting them to any other detriment.
- The Disability Royal Commission recommended that this provision be amended to explicitly cover exclusion and suspension in addition to expulsion. In making this recommendation, the Disability Royal Commission said that the Disability Discrimination Act should 'make it unlawful for an educational authority to discriminate against a student by suspending or excluding [them] on the grounds of a student's disability'.[167]
- We are seeking your views on how best to address exclusion and suspension. We are also seeking your views on whether the proposed amendment should apply to the higher education, early childhood education or vocational education and training sectors, or whether any different approaches or considerations would be required for those sectors.

Discussion

Section 22(2) of the Disability Discrimination Act makes it unlawful for an educational authority to discriminate against a student on the ground of the student's disability:

- by denying the student access, or limiting the student's access, to any benefit provided by the educational authority; or
- by expelling the student; or
- by subjecting the student to any other detriment.[168]

An educational authority is a person or body who administers an educational institution. An educational institution means a school, college, university or other institution that provides education or training.

167 Disability Royal Commission, 'Inclusive education, employment and housing', *Final Report,* 2023, Volume 7, Part A, p 170.
168 *Disability Discrimination Act 1992* (Cth) s 22(2)

The Disability Royal Commission recommended making it explicitly unlawful to discriminate against a student on the grounds of their disability by suspending or excluding the student. The Disability Royal Commission noted that this is arguably already covered by section 22(2)(c), under which it is unlawful to subject a student to any other detriment. However, the Disability Royal Commission considered that expressly clarifying that exclusion and suspension can constitute discrimination would assist in ensuring that students with disability are able to effectively remain engaged and supported in their education, both during and following the use of exclusionary discipline.[169]

Exclusionary discipline refers broadly to the use of both formal and informal exclusion within the education sector, specifically suspension, expulsion and general exclusion. The Disability Royal Commission acknowledged throughout its report the inappropriate use of exclusionary discipline in educational settings. The Disability Royal Commission received numerous submissions which demonstrate the prevalence of the inappropriate use of exclusionary discipline. Despite awareness of the issue, it is difficult to provide specific details regarding the extent to which this is occurring given vastly different interpretations of exclusionary discipline. These variations mean that there is currently no consistent benchmark for measuring the use of exclusionary discipline. The issue of exclusion extends also to the refusal of admissions at all levels of the education sector. However, limited supporting data is available, therefore the extent of this is also difficult to quantify.[170]

The Disability Royal Commission received many submissions that supported the review of section 22 of the Disability Discrimination Act and there have also been numerous other inquiries conducted into the use of exclusionary discipline both federally and at the state and territory level. The large number of reviews and inquiries conducted in recent years demonstrate increasing concern around the inappropriate use of exclusionary discipline.

Varying interpretations of exclusionary discipline

There are significant differences in the interpretation of the term 'exclusionary discipline' between state and territory jurisdictions (see table 5), which means that their approaches and policies relating to exclusionary discipline vary. The table below demonstrates the different interpretations of exclusionary discipline in the context of schools. The table does not depict the interpretations of exclusionary discipline in the early childhood and higher education sectors, noting many Australian states and territories have alternative legislation governing these sectors. The existing legislation for higher education and early childhood education does not include provisions addressing exclusionary discipline. In considering the Disability Royal Commission's recommendation, we are seeking feedback on how to define the concepts of 'exclusion' and 'exclusionary discipline' to ensure legislative amendments would be clear and effective across sectors.

There are provisions in state and territory legislation relating to exclusionary discipline which could be considered in the development of a provision in the Disability Discrimination Act.

169 Disability Royal Commission, 'Inclusive education, employment and housing', *Final Report,* 2023, Volume 7, Part A, p 170.
170 Disability Royal Commission, 'Inclusive education, employment and housing', *Final Report,* 2023, Volume 7, Part A, pp 157–159.

Table 5: Australian state and territory legislation interpretations of exclusionary discipline in the schooling sector

State/ Territory	Legislation	Interpretation of exclusionary discipline
Australian Capital Territory (ACT)	*Education Act 2004* (ACT)	Under the Education Act, a student may only be suspended if the student has engaged in 'unsafe and non-compliant behaviour', the school has exhausted all reasonable alternatives to suspending the student, and it is reasonable to suspend the student considering all of the circumstances.[171] The grounds for expulsion and exclusion are broadly similar, however the Education Act also requires that: ● For expulsion: it is not in the best interests of the student, another student and/or a member of staff at the school for the student to remain at the school. ● For exclusion: it is not in the best interests of the student, another student and/or a member of staff at a school for the student to be enrolled at any relevant school.
Victoria (Vic)	*Ministerial Order 1125 – Procedures for Suspension and Expulsion of Students in Government Schools (2018) (Ministerial Order)*	Under the Ministerial Order, suspension can be imposed in response to behaviours that impose a real, threatened or perceived danger to the health, safety, and/or wellbeing of others and in response to unproductive behaviour that interferes with the wellbeing, safety or educational opportunities of another student. Expulsion is permissible on the same grounds as suspension, with the only addition that the behaviour 'is of such a magnitude that...expulsion is the only available mechanism'.[172]
Queensland (Qld)	*Education (General Provisions) Act 2006* (Qld)	Under the Education (General Provisions) Act, grounds for suspension include disobedience, misbehaviour, conduct that adversely, or is likely to adversely, affect other students or the good order and management of the school, and when the student's attendance at school poses an unacceptable risk to safety or wellbeing of other students or staff.[173] Similarly, the Act specifies grounds for exclusion to be broadly the same as those for suspension, however, specifies that disobedience must be 'persistent'. Suspension and exclusion are also permissible under the Act if the principal is reasonably satisfied that it would not be in the best interests of the staff or other students for the student to be enrolled at the school.

171 *Education Act 2004* (ACT) Ch 2A.
172 Minister for Education (Vic), *Ministerial Order 1125 – Procedures for Suspension and Expulsion of Students in Government Schools 2018* (9 May 2018, updated 3 February 2022) cls 8–15.
173 *Education (General Provisions) Act 2006* (Qld) ss 281–310.

State/ Territory	Legislation	Interpretation of exclusionary discipline
South Australia (SA)	*Education and Children's Services Act 2019* (SA)	Under the Education and Children's Service Act, there are grounds for all forms of exclusionary discipline (i.e., suspension, expulsion and exclusion).[174] Grounds for both suspension and exclusion include threatening or perpetrating violence, acting in a manner that threatens the safety of a student or staff member, interfering with the ability of a teacher to instruct students, conduct that threatens the good order of the school and persistent and wilful inattention or indifference to school work. Expulsion cannot be considered if the student has not been suspended from school attendance for a period of up to 20 days under this Act or a repealed Act.
New South Wales (NSW)	NSW Department of Education – *Student Behaviour Procedures Kindergarten to Year 12: Implementation Document for Student Behaviour Policy*	The Student Behaviour Guidelines govern the exercise of the powers conferred by legislation to suspend or expel students.[175] The guidelines provide grounds for suspension based on actual harm or unacceptable risk to the health, safety and wellbeing of any person. This document also establishes guidelines surrounding expulsion.
Northern Territory (NT)	*Education Act 2015* (NT)	Under the Education Act, a student may be suspended by the principal if their presence is likely to constitute a risk of physical or psychological harm to other people in the school.[176] Exclusion can be imposed by the CEO (if in a government school) if the student is charged with an offence which is punishable by a term of imprisonment for longer than 2 years. Expulsion may only be administered by the minister, although there are no guidelines around what constitutes grounds for expulsion.
Western Australia (WA)	*School Education Act (1999)* (WA)	Under the School Education Act, a suspension or exclusion may be imposed in response to a breach of school discipline.[177] This can include conduct that adversely affects or threatens the safety of any person on school premises or participating in the school's education programs, has caused or is likely to result in damage to property, or has disrupted the educational instruction of other students.

174 *Education and Children's Services Act 2019* (SA) ss 76–80.
175 New South Wales Department of Education, *Student Behaviour Procedures Kindergarten to Year 12: Implementation document for the Student Behaviour policy*, Department of Education, NSW Government, 2022, pp 25–28, accessed 10 September 2024.
176 *Education Act 2015* (NT) ss 91–95.
177 *School Education Act 1999* (WA) ss 88–96.

State/ Territory	Legislation	Interpretation of exclusionary discipline
Tasmania (Tas)	*Education Act 2016* (Tas)	Under the Education Act, the following elements must all be met for there to be grounds for suspension: ● unacceptable behaviour ● the behaviour poses a risk to the health and safety of others, and ● the risk may be removed by the immediate removal of the student.[178]

Special measures

Expressly including 'exclusion' as a ground for discrimination in the Disability Discrimination Act may raise concerns that pre-existing disability learning and support plans and other approved assistive practices for students, which are agreed by the students and their parents, could be considered 'exclusionary' under the proposed amendment.

Section 45 of the Disability Discrimination Act and 10.5(2) of the Education Standards provide it is not unlawful for an education provider to provide special measures (including specialised units or institutions) intended specifically for the benefit of students with disability.[179] The Education Standards provide that special measures can take the form of programs or initiatives that afford students with disability, or with a particular disability, benefits, grants, programs, goods, or access to facilities, services or opportunities to meet their special needs in relation to education and training.[180]

These provisions will help to ensure that any measures that are formally established between the student or parent of the student and the educational authority for the benefit of the student are not considered exclusionary or unlawful. Expanding what constitutes a special measure may further support educational authorities to provide students with the means to remain engaged in education.

Application to tertiary education

Stakeholders have raised concerns regarding the use of exclusionary discipline in tertiary education. They have expressed concern that many universities and TAFEs are not compliant with the Disability Discrimination Act and students in tertiary education settings may face different barriers to accessing education. This can be, for example, because it is more difficult for parents to advocate for their children at the tertiary education level. This concern is exacerbated by the lack of clear data on the use of exclusionary discipline in this sector. Most reviews into exclusionary discipline have had a strong focus on early childhood education and care and school systems, and have not considered tertiary education.

178 *Education Act 2016* (Tas) s 130.
179 *Disability Discrimination Act 1992* (Cth) s 45, *Disability Standards for Education 2005* (Cth) s 10.5.
180 *Disability Standards for Education 2005* (Cth) s 10.3.

The National Student Ombudsman, while not designed exclusively for exclusionary discipline complaints, may provide a pathway for consideration of such complaints by higher education students, including by referring such complaints, with the consent of the complainant, to appropriate bodies including the Australian Human Rights Commission. The National Student Ombudsman provides an independent, impartial and trauma-informed mechanism for higher education students to complain about a broad range of actions of their higher education providers, which could include complaints about the use of exclusionary discipline and reasonable adjustments.
The National Student Ombudsman is able to consider issues beyond legality when assessing a complaint – for example whether actions of a higher education provider were unjust, oppressive, discriminatory or otherwise wrong. The National Student Ombudsman began taking complaints on 1 February 2025.[181] The National Student Ombudsman is not able to consider complaints relating to Vocational Education and Training, however, students can contact the National Training Complaints Hotline to have their complaint referred to the most appropriate authority.

Given the differences between higher education and vocational education and training settings, we are seeking feedback on whether amendments to expressly make exclusionary discipline unlawful should also apply to this sector, or whether a different approach would be required.

Consultation questions

23. **Should the concepts of exclusion and exclusionary discipline be defined in the Disability Discrimination Act?**
24. **Should there be exceptions or limits on when exclusion is unlawful?**
25. **Should any of the state and territory provisions relating to exclusionary discipline be adopted in the Disability Discrimination Act?**
26. **Would a different approach to exclusionary discipline be more appropriate in the higher education and vocational education and training sectors?**

181 The Hon Jason Clare MP and The Hon Mark Dreyfus MP, *National Student Ombudsman announced* [media release], Ministers' Media Centre: Ministers of the Education Portfolio website, 2024, accessed 29 November 2024.

Part 4 – Improving access to justice

Recommendations 4.29 and 4.30 – Offensive behaviour and vilification protections

Summary

- The Disability Discrimination Act prohibits harassment in specific areas of public life. However, there is no general prohibition on offensive behaviour or vilification.
- The Disability Royal Commission recommended 2 new provisions to better protect people with disability from offensive behaviour and vilification:
  - a prohibition on offensive behaviour because of a person's disability, modelled on section 18C of the Racial Discrimination Act (Recommendation 4.29)
  - a provision directed at conduct more serious and harmful (including the incitement of hate or threatening violence because of a person's disability) than the offensive behaviour provision in recommendation 4.29 (Recommendation 4.30).[182]
- We are seeking your views on how these recommendations could be implemented, including the appropriate definitions, and how the provisions could apply in online public spaces.

Discussion

The Disability Discrimination Act does not include any provisions relating to offensive behaviour or vilification.

The Disability Discrimination Act does include provisions which make it unlawful for a person to harass another person. However, it does not define harassment or what constitutes an act of harassment. The harassment provisions in the Disability Discrimination Act currently assume that harassment occurs only between individuals.[183] These provisions do not explicitly address harassment experienced by people with disability that has either been perpetrated by a group or directed towards a group of people with disability. Other legal frameworks contain definitions or broader interpretations of what constitutes harassment (see table 6).

182 Disability Royal Commission, 'Realising the human rights of people with disability', *Final Report,* 2023, Volume 4, pp 316–327.
183 See for example *Disability Discrimination Act 1992* (Cth) s 35.

New provision on offensive behaviour

The Disability Royal Commission recommended a new provision making it unlawful to do an act, otherwise than in private if:

- the act is reasonably likely, in all circumstances, to offend, insult, humiliate or intimidate another person or group of people
- the act is done because of the disability of the other person or because some or all of the people in the group have or are perceived by the first person to have a disability.[184]

The Disability Royal Commission recommended this be defined as 'offensive behaviour', consistent with the Racial Discrimination Act. However, the proposed wording is almost identical to the definitions of 'harassment' in various federal, state and territory legislation as demonstrated in table 6.

Sections 35-39 of the Disability Discrimination Act currently makes the harassment of people with disability and their associates unlawful in:

- employment or work,
- the provision of goods, services and facilities, and
- education.[185]

Existing offensive behaviour provisions

Provisions on harassment and offensive behaviour are already included in other Commonwealth legislation. All of the definitions in these Acts include the language of 'humiliate', 'offend' and 'intimidate'. Other anti-discrimination Acts, as detailed in the table below (table 6), contain similar provisions that could be used as a model for the Disability Discrimination Act. Similarly, all states and territories also have their own anti-discrimination legislation, all of which include provisions on harassment and offensive behaviour that are similar, if not identical, to those included in the federal legislation.[186]

The Disability Royal Commission suggested that section 18C of the Racial Discrimination Act on offensive behaviour be used as a model for a new, similar provision in the Disability Discrimination Act. This would mean that it would be unlawful for a person to do an act, in public, that is reasonably likely to offend, insult, humiliate or intimidate a person or group of people, where the act is done on the basis of a person's disability.

184 Disability Royal Commission, 'Realising the human rights of people with disability', *Final Report,* 2023, Volume 4, p 324.
185 *Disability Discrimination Act 1992* (Cth) ss 35–39.
186 *Anti-Discrimination Act 1977* (NSW) s 22A; *Equal Opportunity Act 2010* (Vic) s 92; *Equal Opportunity Act 1984* (SA) s 87(9)(a); *Equal Opportunity Act 1984* (WA) ss 24–26 and 49A–49C; *Anti-Discrimination Act 1991* (Qld) s 119; *Anti-Discrimination Act 1992* (NT) s 22; *Anti-Discrimination Act 1998* (Tas) s 17; *Discrimination Act 1991* (ACT) s 58.

Table 6: Prohibitions on harassment in federal legislation

Legislation	Prohibitions on offensive behaviour or harassment
Racial Discrimination Act	The Racial Discrimination Act provides that it is unlawful to do an act, in public, if the act is reasonably likely to **offend, insult, humiliate or intimidate** another person or group of people, and the act is done because of the race, colour, or national or ethnic origin of the other person or some or all of the people in the group.[187] The Racial Discrimination Act contains **exemptions** including where something is said or done in the performance, exhibition or distribution of an artistic work or for any **genuine academic, artistic or scientific purpose**.
Sex Discrimination Act	The Sex Discrimination Act provides that a person sexually harasses another person if the person makes an unwelcome sexual advance or engages in other unwelcome conduct of a sexual nature in circumstances in which a reasonable person would anticipate the possibility that the person harassed would be **offended, humiliated or intimidated**.[188]
Disability Education Standards for Education 2005 (Cth) (Education Standards)	The Education Standards define harassment as 'any action taken in relation to the person's disability that is reasonably likely, in all the circumstances, to **humiliate, offend, intimidate or distress** the person' with disability.[189] This definition applies both to a person with disability and to a person who has an associate with disability.

Anti-discrimination legislation typically provides varying exemptions. Section 18D of the Racial Discrimination Act provides exemptions to section 18C, such as that things said or done in relation to an artistic work or in the course of any genuine academic, artistic or scientific purpose are not considered unlawful. The Disability Royal Commission recommendation did not discuss exemptions, so section 18D may form the basis for appropriate exemptions to a new provision in the Disability Discrimination Act.

Section 18C of the Racial Discrimination Act has attracted considerable debate over whether it imposes unreasonable restrictions on individuals' free speech.[190] The need to balance competing rights and interests would also need to be considered when developing a similar provision in the Disability Discrimination Act.

Public places and online safety

Stakeholders have expressed that the proposed amendments relating to offensive behaviour should consider how 'public place' is defined, and social media and other online spaces accessible to the public should be reflected. For example, Short Statured People of Australia have raised concerns about offensive behaviour, including comments on social media posts belittling the short statured community.[191]

187 *Racial Discrimination Act 1975* (Cth) s 18C.
188 *Sex Discrimination Act 1984* (Cth) ss 28A and 28M.
189 *Disability Standards for Education 2005* (Cth) s 8.1.
190 Parliamentary Joint Committee on Human Rights, 'Freedom of Speech in Australia – Inquiry into the operation of Part IIA of the *Racial Discrimination Act 1975* (Cth) and related procedures under the *Australian Human Rights Commission Act 1986* (Cth)', *Inquiry Report*, February 2017.
191 Maree Jenner, *Statement of Maree Jenner on behalf of Short Statured People Australia in response to the Disability Royal Commission*, September 2022, STAT.0635.0001.0001, p 11.

Consideration must also be given to who, in these circumstances, would be responsible for an act of offensive behaviour or harassment – the individual that makes the post or the platform on which the post is published.

Legislation such as the *Online Safety Act 2021* (Cth) establishes expectations for service providers to prevent harmful content being posted online, making providers more accountable for the online safety of the people using their services.[192] The Online Safety Act also provides for the development of industry codes and standards which are enforceable and compel industry to establish appropriate safeguards in relation to certain types of harmful online material.[193] State and territory legislation also deals with individual liability for individuals who use digital means to harass or abuse another individual or group.[194] This existing legislation may be useful as a framework to establish instances in which an individual may be liable for discrimination versus when the platform or service provider may be liable.

New provision on vilification

The Disability Royal Commission recommended that the Disability Discrimination Act be amended to make it unlawful to vilify a person or group of people with disability on the ground of their disability or perceived disability. It recommended that vilification be defined to include behaviour that incites hatred or threatens violence toward a person or group of people with disability.[195]

In its public hearings, the Disability Royal Commission heard about the frequency of hate crimes and vilification toward people with disability. Concerns were raised that some types of public abuse do not breach criminal law and are not always covered by other legal protections against harassment and discrimination.[196] Currently, the Disability Discrimination Act does not include specific protections for people with disability from vilification. Such conduct is only unlawful if it can be characterised as another form of prohibited discrimination under the Disability Discrimination Act.

There has been a notable increase in support for provisions to protect people with disability from vilification. Queensland Advocacy Incorporated provided multiple case studies in its submission to the Queensland Parliamentary Committee Inquiry into Serious Vilification and Hate Crime in 2021 which demonstrated the severity of vilification experienced by people with disability and supported the need for vilification to be addressed in legislation.[197] Other reviews and inquiries, including the Inquiry into Anti-Vilification Protections conducted by the Victorian Legislative Assembly Legal and Social Issues Committee and the Final Report on the Review of the *Equal Opportunity Act 1984* (WA) by the Law Reform Commission of Western Australia, have also recommended an increase in vilification protections for people with disability.[198] Amendments to the relevant Acts are yet to be made.[199]

192 eSafety Commissioner, *Online Safety Act 2021 Fact Sheet*, eSafety Commissioner, Australian Government, January 2022, accessed 27 November 2024.
193 eSafety Commissioner, *Online Safety Act 2021 Fact Sheet*, eSafety Commissioner, Australian Government, January 2022, accessed 27 November 2024.
194 Andrew Byrnes, *Is Cyberbullying a Crime in Australia? Understanding the Laws to Protect Yourself Online*, Andrew Byrnes Law Group website, 2023, accessed 27 November 2024.
195 Disability Royal Commission, 'Realising the human rights of people with disability', *Final Report,* 2023, Volume 4, p 326.
196 Nicole Asquith, *Statement of Professor Nicole Asquith in response to the Disability Royal Commission*, September 2022, STAT.0641.0001.0001, p 5.
197 Queensland Advocacy Incorporated, *Submission to the Parliamentary Committee Inquiry into serious vilification and hate crime*, July 2021, p 4.
198 Legislative Assembly Legal and Social Issues Committee, 'Inquiry into Anti-Vilification Protections', *Final Report,* Victorian Government, March 2021, pp 51–58.
199 Law Reform Commission of Western Australia, 'Review of the *Equal Opportunity Act 1984* (WA)', *Project 111 - Final Report, 2022*, pp 223–232.

Criminal law and vilification

Legislative provisions protecting particular groups of people from vilification, particularly when relating to the incitement of violence, are often contained in criminal law, with breaches being dealt with by the police.

The Australian Capital Territory, Tasmania and Victoria are the only jurisdictions to have legislation explicitly prohibiting vilification on the basis of disability.[200] Vilification protections are not uncommon across other jurisdictions in Australia. New South Wales, Queensland, South Australia and Western Australia all have legislation imposing criminal penalties for vilification on other grounds, although not disability.[201] Victoria has recently passed the *Justice Legislation Amendment (Anti-vilification and Social Cohesion) Act 2025*, which strengthens existing civil protections against vilification and creates 2 new criminal offences under the *Crimes Act 1958* (Vic) to respond to vilification on the basis of a person's protected attribute (including disability).[202]

The Commonwealth has recently passed the *Criminal Code Amendment (Hate Crimes) Act 2025* (Cth) in February 2025. The Act amended existing criminal offences for urging the use of force or violence, and created new criminal offences for directly threatening the use of force or violence, against a group, a member of a group or their close associates. It also created new offences for advocating or threatening damage to property or a motor vehicle owned or occupied by a group, member of a group or a close associate.[203] These protections now extend to people with disability, and their carers or assistants (within the meaning of subsection 9(1) of the Disability Discrimination Act).[204]

During its consideration of the Criminal Code Amendment (Hate Crimes) Bill 2024, the Senate Legal and Constitutional Affairs' Legislation Committee considered evidence from a number of stakeholders, including People with Disability Australia, who argued that serious vilification should be criminalised.[205] While the Committee did not recommend changes to the Bill be made to create offences for serious vilification, the Committee recommended that the Bill be expanded further to explicitly extend protections to people with disability. This recommendation was implemented in the reforms to the Criminal Code that were passed in February 2025.

We are seeking feedback on how this recommendation could be implemented within the Disability Discrimination Act, or whether particular conduct is now sufficiently addressed within criminal law.

200 *Criminal Code 2002* (ACT) s 750(1); *Anti-Discrimination Act 1998* (Tas) s 19.

201 *Crimes Act 1900* (NSW) s 93Z; *Anti-Discrimination Act 1991* (Qld) s 124A; *Racial Vilification Act 1996* (SA) s 4; *Criminal Code Act Compilation Act 1913* (WA) Ch XI; Justice Legislation Amendment (Anti-Vilification and Social Cohesion) Bill 2024 (Vic).

202 The Hon Sonya Kilkenny MP, ***Protecting More Victorians From Hate*** [media release], Premier of Victoria website, 2 April 2025, accessed 13 May 2025.

203 *Criminal Code Act 1995* (Cth) s 80.2A–80.2K.

204 The Hon Mark Dreyfus KC MP, ***Albanese Government acts against hatred and violence*** [media release], Attorney-General's portfolio website, 12 September 2024, accessed 13 June 2025.

205 People with Disability Australia, Submission in response to the Inquiry into the Criminal Code Amendment (Hate Crimes) Bill 2024 [PDF 375KB], 4 November 2024, accessed 22 January 2025.

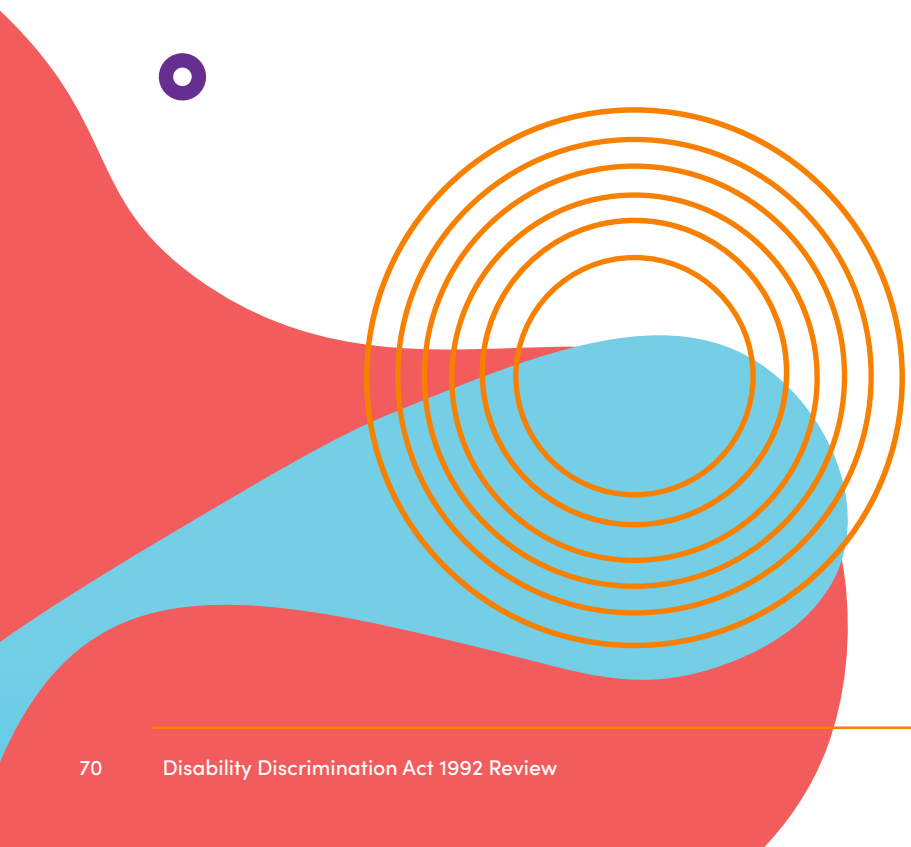
Consultation questions

Harassment and offensive behaviour

27. How could the Disability Discrimination Act be amended to protect people with disability from offensive behaviour and/or harassment?
28. If the Disability Discrimination Act were to prohibit offensive behaviour and/or harassment, how should these terms be defined?
29. Should there be exemptions for any behaviour, similar to the Racial Discrimination Act?

Vilification

30. Given the recent legislative developments, are there any further gaps in the legislative framework that could be addressed by amendments to the Disability Discrimination Act to protect people with disability from vilification?



Recommendation 8.19 – Services provided by police officers

Summary

- The Disability Discrimination Act prohibits discrimination in the provision of services, which among other things, generally covers the interaction between police and witnesses, victims of crime, and members of the public. However, the courts have determined that the Disability Discrimination Act does not consistently cover interactions between police and those suspected of committing an offence.
- The Disability Royal Commission recommended the Disability Discrimination Act be amended to ensure all people with disability are protected from unlawful discrimination when engaging with police, regardless of the nature of that engagement.
- We are seeking views on how this objective can best be achieved, and any other potential gaps in the Disability Discrimination Act's coverage of the justice system that may need amendment.

Discussion

People with disability are over-represented in the justice system and more often criminalised by police.[206] People with disability also have disproportionately high levels of contact at earlier stages of the criminal justice process.[207] The Disability Royal Commission referred to an adult prisoner entrant survey, which incorporated information from all Australian states, except New South Wales. It recorded that almost 1-in-3 (29%) prison entrants reported a chronic condition or disability that affected their participation in day-to-day activities, education or employment. This compares with 1-in-5 (22%) people in the general community.[208]

The criminalisation of people with disability has intersecting impacts for First Nations people with disability. Research commissioned by the Disability Royal Commission found that 'First Nations people with cognitive disability who come to police attention are more likely to be investigated, charged and remanded in custody than First Nations people without cognitive disability'.[209] The Disability Royal Commission also noted that 'rates of disability are also higher among adult First Nations offenders than among adult non-Indigenous offenders'.[210] The Disability Royal Commission labelled this overrepresentation a 'national crisis'.[211] The Disability Royal Commission also noted in the context of domestic and family violence many people with disability, especially women and First Nations people, are misidentified as perpetrators which has direct repercussions on the support they receive and treatment through the justice system.

206 Disability Royal Commission, 'Criminal justice and people with disability', *Final Report*, 2023, Volume 8, pp 33-36
207 Disability Royal Commission, 'Criminal justice and people with disability', *Final Report*, 2023, Volume 8, p 35 citing Karina Marshall-Tate, Eddie Chaplin, Jane McCarthy and Annmarie Grealish, 'A literature review about the prevalence and identification of people with an intellectual disability within court Liaison and Diversion services', *Journal of Intellectual Disabilities and Offending Behaviour*, 2020, 11(3):159-169.
208 Disability Royal Commission, 'Criminal justice and people with disability', *Final Report*, 2023, Volume 8, p 34.
209 Disability Royal Commission, 'Criminal justice and people with disability', *Final Report*, 2023, Volume 8, p 37.
210 Disability Royal Commission, 'Criminal justice and people with disability', *Final Report*, 2023, Volume 8, p 38.
211 Disability Royal Commission, 'Criminal justice and people with disability', *Final Report*, 2023, Volume 8, p 38.

Australia's Disability Strategy 2021-2031 highlights the government's commitment to ensuring people with disability have equal access to justice. Policy Priorities 5 and 6 in the 'Safety, Rights and Justice' Outcome Area aim to ensure people with disability have equal access to justice, and that the criminal justice system responds effectively to the complex needs and vulnerabilities of people with disability.[212] Additionally, Outcome Areas 10 and 11 of the National Agreement on Closing the Gap aim to address the overrepresentation of First Nations people in the criminal justice system.[213]

Clarifying the legal obligations of police officers in relation to disability discrimination will complement these measures and provide greater certainty to people engaging with police.

Disability Royal Commission recommendation

At present, the prohibition against discrimination in service delivery does not cover interactions between police and people with disability suspected of committing an offence. The current definition of services under the Disability Discrimination Act is:

services includes:

a. services relating to banking, insurance, superannuation and the provision of grants, loans, credit or finance; or
b. services relating to entertainment, recreation or refreshment; or
c. services relating to transport or travel; or
d. services relating to telecommunications; or
e. services of the kind provided by the members of any profession or trade; or
f. services of the kind provided by a government, a government authority or a local government body.

The Disability Royal Commission recommended that 'services provided by police officers in the course of performing policing duties and powers' be included in this definition. The intent behind the amendment would be to explicitly clarify that all aspects of policing are covered under the Disability Discrimination Act. In this way, the arrest of suspects as a policing duty would be covered, and suspects would have more certainty about their ability to make a claim of discrimination under section 24 of the Disability Discrimination Act.

How have the courts interpreted services in the Disability Discrimination Act?

The Disability Royal Commission noted courts have interpreted the meaning of 'services' in a policing context to only include interactions with witnesses, victims of crime, and members of the public.

Courts have emphasised that the definition should be given a 'fair, large and liberal' interpretation rather than a literal or technical one, and 'construed as widely as their terms permit'.[214,215] However, certain decisions of courts and tribunals have found that police do not provide 'services' for the purpose of discrimination law when interacting with a person suspected of committing an offence.[216]

212 Department of Social Services, *Australia's Disability Strategy 2021-2031,* Department of Social Services, Australian Government, 2021, pp 17–18.
213 Department of the Prime Minister and Cabinet, *National Agreement on Closing the Gap*, Department of the Prime Minister and Cabinet, Australian Government, July 2020, pp 32–33.
214 *IW v City of Perth* (1997) 191 CLR 1, 12 (Brennan CJ and McHugh J).
215 *IW v City of Perth* (1997) 191 CLR 1, 22–23 (Dawson and Gaudron JJ).
216 *Robinson v Commissioner of Police, NSW Police Force* [2012] FCA 770; *Ella v State of NSW (NSW Police)* [2005] NSWADT 145; *Budd v State of NSW (NSW Police)* [2006] NSWSC 1266.

Some judicial commentary has tried to draw out characteristics of a 'service'. The Federal Court of Australia confirmed that police could be seen to provide a service in the 'initial investigation' of a call for assistance, by benefiting would-be victims of crime by protecting them from harm.[217] However, the court in this case considered that police do not provide a service in subsequent investigation processes and decisions.[218] This includes when police decide whether any action should be taken against alleged offenders or other decisions on bail applications or to question offenders.[219,220] However, no definitive legislative test has been formulated to decide the question.[221]

Imposing duties on police officers must be carefully considered to ensure they are able to complete their jobs, including completing all tasks safely, confidently, and effectively. In claims of negligence against police, courts have been reluctant to find that police owe any particular legal duty in how they perform their functions to victims of crime, complainants, and the broader community. This is on the basis that imposing additional legal duties on police officers may inhibit how they carry out their duties. Any changes to the Disability Discrimination Act would need to be carefully calibrated so as not to inhibit police functions, whilst ensuring that people with disability are protected from discrimination, including as victims of crime, complainants, witnesses, and suspects.

Instead of including policing in the definition of services as proposed by the Disability Royal Commission, another option could be to cover police activities separately from the definition of services. This could involve a new provision or provisions being inserted into the Disability Discrimination Act to cover policing and the justice system. This may enhance clarity for police and suspects, and reduce future statutory interpretation problems in reading police's interactions with suspects into the existing definition of 'services'. This is because police aren't necessarily providing a 'service' to a suspect in the same way that other services are provided to people with disability.

Consultation questions

31. **How could the Disability Discrimination Act be amended to ensure that it covers policing?**
32. **Are there any specific circumstances or situations relating to policing or justice that should be excluded from the application of the Disability Discrimination Act?**

217 *Bickle v State of Victoria (Victoria Police)* [2020] FCA 168 [18].
218 *Bickle v State of Victoria (Victoria Police)* [2020] FCA 168 [19].
219 *Bickle v State of Victoria (Victoria Police)* [2020] FCA 168 [22].
220 *Robinson v Commissioner of Police, NSW Police Force* [2012] FCA 770.
221 Edward Elliott, 'Anti-Discrimination Litigation and NSW Police: Reviving the Force vs Service debate', *Alternative Law Journal,* 2013, 38(2):113–117, p 113. See also: *Field Meret v State of Vic – Dept of Human Services* [1999] VCAT 616; *Commissioner of Police v Mohamed* [2009] NSWCA 432 *and IW v City of Perth* {1997} CLR 1, 11–12 (Brennan CJ and McHugh J), 22–24 (Dawson and Gaudron JJ), 27–29 (Toohey J) and 41 (Gummow J).

Part 5 – Exemptions

Summary

- The Disability Discrimination Act includes 10 permanent exemptions which set out when discrimination against people with disability is not unlawful. The Australian Human Rights Commission can also grant temporary exemptions (see table 7 for a summary of each exemption and its rationale).
- These exemptions balance the Disability Discrimination Act's purpose of eliminating disability discrimination with other competing policy priorities.[222] For example, discrimination is exempt if it is to contain infectious diseases and is reasonably necessary to protect public health.
- We are seeking your views on whether the current exemptions are the minimum necessary to implement and maintain other government policies and law, or whether any unnecessary provisions could be removed.

Discussion

An exemption means that conduct that might otherwise be unlawful under the Disability Discrimination Act is 'exempt' and therefore not unlawful. The 10 permanent exemptions under the Disability Discrimination Act can be relied upon as an exception if a discrimination complaint is made to the Australian Human Rights Commission (or in a subsequent application to a court). Exemptions exist to balance the rights prescribed under the Disability Discrimination Act with competing government public policy and the interests of broader society. It is important to ensure that exemptions continue to be the minimum necessary to implement and maintain other government policies and law.

The Disability Royal Commission considered the exemptions under the Disability Discrimination Act and noted that rights are not absolute and are not protected regardless of their impact on others.[223] This is consistent with the Disabilities Convention. The Disability Royal Commission stated that the Disability Discrimination Act exemptions should clearly and precisely frame how they limit the rights of people with disability.

Table 7: Exemptions under the Disability Discrimination Act

Exemption	What does the exemption do?	What is the reason for the exemption?
Special Measures (Section 45)	An action is not unlawful discrimination if it is reasonably intended to: • ensure people with disability have equal opportunities to others • afford people with disability with goods, access to facilities, services or opportunities, grants, benefits or programs to meet special needs.	This exemption is in place to improve equality of opportunity and overcome disadvantage for people with disability. The Disability Royal Commission noted that the special measures exemption is of 'particular significance' to the lives of people with disability.

222 Explanatory Memorandum, Disability Discrimination Bill 1992, p 9.
223 Disability Royal Commission, 'Realising the human rights of people with disability', *Final Report,* 2023, Volume 4, p 328.

Exemption	What does the exemption do?	What is the reason for the exemption?
Superannuation and insurance (Section 46)	It is not unlawful discrimination to refuse a person with disability an annuity, insurance policy, superannuation or provident fund/ scheme if the discrimination is reasonably based upon data and other relevant factors. It is also not unlawful to discriminate in such a way in relation to the terms and conditions on which those products are offered.	This exemption is in place because superannuation and insurance are provided on the basis of if and when an insurance or superannuation payment is likely to be made. People with disability may be likely to have superannuation or insurance payments made earlier than people without disability.[224] In September 2024, the Australian Government announced that it would prohibit life insurers from discriminating against applicants on the basis of an adverse genetic or genomic test result. However, insurers would retain the ability to discriminate based on a confirmed diagnosis, regardless of whether that diagnosis resulted directly or indirectly from a genetic test. The Treasury is working to progress legislation to implement this reform.
Acts done under statutory authority (Section 47)	An action is not unlawful discrimination if a person is complying with: • a court order • an industrial instrument, order, award or determination of a court or tribunal to the extent to which it relates to capacity-based salary or wages for people with disability • a law prescribed under the regulations.	This exemption is in place to ensure that actions which comply with court orders, industrial instruments and certain laws can be carried out without risk of unlawfulness.[225] This includes industrial instruments, orders, awards or determinations which prescribe capacity-based rates of salary or wages paid to people with disability.
Infectious diseases (Section 48)	An action is not unlawful discrimination if the person's disability is an infectious disease and the action is reasonably necessary to protect public health.	This exemption is in place to maintain public health laws related to the control of infectious diseases and ensures the protection of public health.[226]
Charities (Section 49)	The provisions of a registered charity's governing rules are not unlawful discrimination if they confer benefits for charitable purposes on people with disability. Any action carried out to give effect to such provisions is also not unlawful discrimination.	This exemption is in place for charities to provide specific benefits or other charitable actions to people with disability without risk of unlawfulness.

224 Explanatory Memorandum, Disability Discrimination Bill 1992, pp 17–18.
225 Explanatory Memorandum, Disability Discrimination Bill 1992, p 18.
226 Explanatory Memorandum, Disability Discrimination Bill 1992, p 18.

Exemption	What does the exemption do?	What is the reason for the exemption?
Pensions and allowances (Section 51)	Laws listed under the Disability Discrimination Act which provide pensions, allowances or benefits, are not unlawful discrimination. This includes any action done in direct compliance with those laws.[227]	This exemption is in place for pensions, allowances and benefits to be paid to people with disability without risk of unlawfulness.
Migration (Section 52)	An action is not unlawful discrimination if it is done in compliance with the *Migration Act 1958* (Cth) ('Migration Act') or any legislative instrument made under the Act. Discriminatory provisions within the Migration Act and its instruments are not affected by the prohibitions on discrimination in work, education, and access to premises, goods, services and facilities and under the Disability Standards.	This exemption is in place to manage public expenditure on health care and community services. It aims to balance the objects of the Disability Discrimination Act with the object of the Migration Act, which is 'to regulate in the national interest, the coming into, and presence in, Australia of non-citizens'. One of the reasons for this exemption is the operation of the Migration Health Requirement, which involves health screening of visa applicants to protect the Australian community from public health and safety risks, contain public expenditure on health care and community services, and safeguard the access of Australian citizens and permanent residents to healthcare and community services that are in short supply. The Department of Home Affairs has completed the Review into the Migration Health Requirement and the Significant Cost Threshold for visa applicants, with a focus on how to balance fairness in the migration system whilst containing public expenditure on health care and community services. The Review Report presented 9 findings with 11 proposed actions which would assist in minimising discrimination within the current function of the Migration Health Requirement. Information on the review and status of the proposed actions is available on the Department of Home Affairs' website.

227 Section 51 currently lists the following Acts: (a) the *Defence Service Homes Act 1918*; or (b) the *Papua New Guinea (Member of the Forces Benefits) Act 1957*; or (d) the *Social Security Act 1991* or a legislative instrument made under that Act; or (da) the *Social Security (Administration) Act 1999* or a legislative instrument made under that Act; or (db) the *Social Security (International Agreements) Act 1999*; or (e) the *Veterans' Affairs Legislation Amendment Act 1988*; or (f) the *Veterans' Entitlements Act 1986*; or (g) the *Veterans' Entitlements (Transitional Provisions and Consequential Amendments) Act 1986*; or (h) the *Military Rehabilitation and Compensation Act 2004*; or (i) the *Military Rehabilitation and Compensation (Consequential and Transitional Provisions) Act 2004*; or (j) the *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988*.

Exemption	What does the exemption do?	What is the reason for the exemption?
Combat duties and peacekeeping services (Section 53)	Actions done by the Australian Defence Force are not unlawful discrimination when they relate to employment, engagement or appointment of people who may be engaged in combat duties, combat related duties, peacekeeping services or support roles for forces engaged in such duties.	This exemption is in place because of the nature of the work and requirements of people who are engaged in combat duties or combat-related duties.
Peacekeeping services by the Australian Federal Police (Section 54)	Actions done by the Australian Federal Police are not unlawful discrimination when in connection with a person's selection for peacekeeping duties as part of a Peacekeeping Force.	This exemption is in place because of the nature of work and the need for the Australian Federal Police to prioritise certain requirements when employing people for peacekeeping duties.
Assistance Animals (Section 54A) (See Part 5 for detailed discussion)	It is not unlawful discrimination for a person to: • request or require that an assistance animal remain under the control of a person • discriminate if the assistance animal has a suspected infectious disease and the discrimination is reasonably necessary to protect public health or the health of other animals • request evidence that an animal is an assistance animal or is trained to meet standards of hygiene and appropriate behaviour.	This exemption is in place to provide certainty for people with disability who require the use of assistance animals, as well as for duty holders who provide access or services to people with assistance animals.
Temporary exemptions (Section 55)	The Australian Human Rights Commission may grant an exemption of up to 5 years to person(s) from complying with provision(s) in the Disability Discrimination Act. If a temporary exemption is granted, the activities covered by it cannot be the subject of a successful complaint under the Disability Discrimination Act. The Australian Human Rights Commission is able to grant the exemptions on such terms and conditions as it sees fit. Exemptions can be extended.	This exemption is in place to enable the Australian Human Rights Commission to grant temporary exemptions from the Disability Discrimination Act where needed. This may be due to a person's specific circumstances preventing compliance with the Disability Discrimination Act.[228]

228 Explanatory Memorandum, Disability Discrimination Bill 1992, pp 19–20.

Special measures exemption

As referenced in table 7, an action is not unlawful discrimination if it is reasonably intended to:

- ensure people with disability have equal opportunities to others
- afford people with disability with goods, access to facilities, services or opportunities, grants, benefits or programs to meet special needs.

An example of a special measure is recruitment targeted towards people with disability to help achieve equality of opportunity in employment.

The special measures exemption was amended in 2009, in response to recommendations 12.4 and 15.2 of the Productivity Commission's 2004 Review of the Disability Discrimination Act. These amendments clarified that the special measures exemption does not apply to:

- discrimination that is not necessary in implementing a special measure
- rates of salary or wages paid to people with disability.

The Australian Human Rights Commission has noted some duty holders, such as businesses, are unsure of the difference between special measures (a permanent exemption) and temporary exemptions. Businesses and other organisations sometimes ask the Australian Human Rights Commission to grant a temporary exemption for conduct that would be covered by the special measures exemption.[229] However, as special measures are not unlawful discrimination, the Australian Human Rights Commission cannot grant temporary exemptions in such cases.

The Australian Human Rights Commission has recommended 2 further changes to improve the operation of the exemption:

- Enable the Australian Human Rights Commission to grant 'special measure certificates', which could help provide assurance to duty holders who may be reluctant to undertake special measures because they are concerned about breaching their obligations under the Disability Discrimination Act.[230] This process would be voluntary and would not be a requirement to be covered by the special measures exemption.
- Include a clarifying definition for special measures to ensure they are interpreted as positive measures and align with international law obligations.[231] For example, in the Sex Discrimination Act, special measures are defined as measures 'for the purpose of achieving substantive equality'.[232]

229 Australian Human Rights Commission, *Free and Equal: An Australian Conversation on Human Rights,* Australian Government, 2021, p 128.
230 Australian Human Rights Commission, *Free and Equal: An Australian Conversation on Human Rights,* Australian Government, 2021, pp 127–128.
231 Australian Human Rights Commission, *Free and Equal: An Australian Conversation on Human Rights,* Australian Government, 2021, p 299.
232 *Sex Discrimination Act 1984* (Cth) s 7D.

Temporary exemptions

As referenced in table 7, the Disability Discrimination Act and the Disability Standards provide the Australian Human Rights Commission with the power to grant temporary exemptions to the Act and the Disability Standards of up to 5 years.

Similar to the discussion on the special measures exemption, several changes could be considered to improve the operation of the exemption, for example:

- Adding a definition of 'temporary exemption' could provide further clarity, assist the Australian Human Rights Commission to specify particular terms and conditions or circumstances in which a temporary exemption applies and resolve confusion about the difference between a temporary exemption and special measure.
- Adding specific criteria for the Australian Human Rights Commission to use in deciding whether to grant an exemption could provide more certainty but limit flexibility. In the absence of statutory criteria, the Australian Human Rights Commission has created its own guidelines to consider whether an exemption is necessary, in line with the objectives of the Disability Discrimination Act.[233]

As of January 2025, there is one temporary exemption under the Disability Discrimination Act currently in place, which relates to the Transport Standards and the Premises Standards.[234]

Consultation questions

33. **Could any of the permanent exemptions be narrowed or updated, while balancing other policy considerations?**
34. **Should the Australian Human Rights Commission be given the power to grant special measures certificates?**
35. **Should a definition for special measures be added to the Disability Discrimination Act?**
36. **Should a definition for temporary exemptions be added to the Disability Discrimination Act?**
37. **Would you recommend any changes to the legislative process of granting temporary exemptions?**

233 Australian Human Rights Commission, *Temporary exemptions under the Disability Discrimination Act 1992 (Cth)*, Australian Human Rights Commission website, 2010, accessed 2 December 2024.

234 Australian Human Rights Commission, *Exemption applications under the Disability Discrimination Act 1992 (Cth)*, Australian Human Rights Commission website, n.d., accessed 30 January 2024.

Part 6 – Modernising the Disability Discrimination Act

Assistance animals

Summary

- The Disability Discrimination Act applies to having an assistance animal in the same way it applies to having a disability.[235] This means that it is unlawful to discriminate against a person because they have an assistance animal in the areas of public life covered by the Disability Discrimination Act.
- We have heard that some people with disability and duty holders remain unsure of their rights and obligations in relation to assistance animals. This can have a negative impact on all parties.
- We are seeking your views on how the rights and obligations of duty holders and people who require an assistance animal could be made clearer.

Discussion

It is unlawful to discriminate against a person because they have an assistance animal in the areas of public life covered by the Disability Discrimination Act, including employment, education, access to premises and access to goods, services and facilities.

The Disability Discrimination Act also sets out specific circumstances that are not unlawful discrimination against a person with an assistance animal. This includes asking a person to keep the assistance animal under their control, denying access to premises or other services if a person reasonably suspects the animal has an infectious disease, or asking for evidence that the animal is an assistance animal.

The Disability Discrimination Act's definition for assistance animals contains 3 limbs under which an animal can be considered an assistance animal. These are that the animal is:

- accredited under a law of a state or territory that provides for the accreditation of animals trained to assist a person with disability to alleviate the effect of the disability
- accredited by an animal training organisation prescribed by the regulations
- trained to assist a person with disability to alleviate the effect of the disability and to meet standards of hygiene and behaviour that are appropriate for an animal in a public place.

The animal only needs to meet one of these 3 limbs to be an assistance animal.

While the majority of assistance animals are dogs, such as guide or hearing dogs, the legal definition for assistance animals extends to any animal trained to alleviate a disability.

Under the first limb, an animal will be an assistance animal if it is accredited under a state or territory law. As at January 2025, 4 states and territories (Queensland, South Australia, Western Australia and the Australian Capital Territory) have their own accreditation schemes. An animal accredited by a state or territory would be protected by the Disability Discrimination Act.

Under the second limb, an animal will be an assistance animal if it has been trained by a training organisation prescribed by the regulations. No training organisations are currently prescribed by the regulations.

235 *Disability Discrimination Act 1992* (Cth) s 8.

The third limb provides another pathway to qualify as an assistance animal under the Disability Discrimination Act, to assist those who may not have access to a state or territory accreditation scheme.[236]

In 2009, the assistance animal definition was amended to increase certainty for both service providers and people with assistance animals. Despite the 2009 reforms, the current assistance animal framework is criticised for being confusing by some assistance animal users, industry, service providers and disability advocates.[237] This can deter people who need an assistance animal from freely participating in society. Through the Assistance Animals Working Group (see box 15), Commonwealth, state and territory government agencies are working to develop consistent national principles for the regulation of assistance animals, which could inform or guide any reforms to state and territory legislation.

Box 15: Assistance animals - a nationally consistent approach to regulation

Officials from all states and territories have been working with relevant Commonwealth agencies as part of an Assistance Animals Working Group. The purpose of the Working Group is to progress work on the development of nationally consistent regulation and accreditation of assistance animals.

As part of this work, the Department of Social Services undertook public consultation between March and May 2021 on the issues arising from differences in assistance animal regulations and legislation between jurisdictions.

Based on the feedback received from the 2021 consultation, the Australian Government worked with states and territories via the Working Group to develop the draft Assistance Animal National Principles.

The draft Assistance Animal National Principles identify, at a high level, the features that accreditation and regulation should have. The Assistance Animal National Principles will not be legally binding but will establish a common and agreed set of principles which states and territories can work towards.

On 21 February, the Disability Reform Ministerial Council endorsed the public consultation on the draft principles which opened on 7 March 2025 and closed on 1 June 2025. The results of this consultation will help refine the draft Assistance Animal National Principles.

Following the consultation, a consultation report will be prepared, which will outline what was learned from the consultation. Once Disability Ministers agree to the principles, it will be the responsibility of state and territory governments to implement them. The Australian Government will continue to assist states and territories to develop operational details for each principle and support their implementation.

While national consistency will benefit assistance animal users, it is only one part of the work needed to improve recognition and acceptance of assistance animals. Reviewing the assistance animal provisions of the Disability Discrimination Act, in addition to the work to develop nationally consistent regulation, could support improved awareness and understanding of protections for assistance animals, and further clarify how legal frameworks apply to assistance animals.

236 Explanatory Memorandum, Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008 (Cth), p 10.

237 See, Australian Human Rights Commission, *Assistance animals and the Disability Discrimination Act 1992 (Cth)*, Australian Human Rights Commission website, 2016, accessed 2 December 2024.

The discussion below covers key issues with the rules relating to assistance animals, and further options for improvement.

Training and accreditation

The Disability Discrimination Act does not provide a specific definition for training. As such, the courts have interpreted 'training' to have its ordinary meaning of 'to discipline or instruct an animal to perform specific actions'.[238] According to the courts, an assistance animal does not have to:

- be trained by a particular type of trainer or organisation
- undertake a particular amount of training
- be accredited by, or registered with, a particular agency.[239]

The breadth of the training requirements can result in uncertainty as to how these requirements apply in practice, and assistance animals receiving different amounts and quality of training. In particular, if someone trains their own animal or the animal is not a 'typical' assistance animal, people with disability may be unsure whether their animal qualifies for protection under the Disability Discrimination Act. Similarly, a duty holder who needs to assess whether an animal has received enough training could be unsure if such training is adequate. Service providers and duty holders may then use this as a reason to refuse handlers access altogether.[240]

There are several options for strengthening and clarifying the training requirements for assistance animals. One or more options in the table below (table 8) could be used to assist duty holders and assistant animal users.

Table 8: Potential options for training and accreditation requirements

Option for strengthening training and accreditation requirements	Explanation
Guidance on training requirements	Guidance could be provided to clarify minimum training requirements under the Disability Discrimination Act. The guidance could: ● be used by training organisations and for self-training of assistance animals ● differentiate between guide dogs, hearing dogs, psychiatric service dogs, other animals (such as an assistance cat), as these animals may be trained to provide different supports ● detail appropriate standards of hygiene and behaviour.
Prescribe training organisations in regulations	Specific animal training organisations that meet the necessary legal requirements could be prescribed in the Disability Discrimination Regulations. This would help both duty holders and people with disability more easily determine when an assistance animal meets the requirements for access under the Disability Discrimination Act.

238 *Forest v Queensland Health* (2007) 161 FCR 152, 174–175 [90]–[92].
239 *Forest v Queensland Health* (2007) 161 FCR 152, 175 [92].
240 Kat Wong, *Puppy love for pollies aims to lick standards dilemma*, The Canberra Times website, 9 September 2024, accessed 2 December 2024.

Option for strengthening training and accreditation requirements	Explanation
Amending the Disability Discrimination Act	The Disability Discrimination Act could be amended to provide greater clarity on training requirements. Any changes would need to ensure people who cannot access formal training and/or accreditation for their assistance animals due to their location or other circumstances are not unreasonably excluded from protection.

Standards of evidence

Stakeholders have raised that confusion also remains around what evidence is required to show that an animal is an assistance animal. This can cause difficulties for both duty holders and service providers when assessing whether evidence is sufficient under the Disability Discrimination Act.

Establishing minimum standards for evidence could help to provide certainty to people with disability of what evidence they need to provide. Likewise, this could help duty holders be certain the evidence they receive is acceptable. There are several options for establishing minimum standards for evidence. These options balance the need for legal certainty with the need for there to be flexibility in any standards, for example, to provide for new accreditation or training schemes as they are established, or to accommodate changes to practices in the medical or animal training communities.

Table 9: Potential standards for evidence

Option for establishing evidence and training requirements	Flexibility and detail	Legal status
Guidance on what can be included	Most flexible – can be updated administratively. No format requirements means that it can be targeted towards public use, and can include as much detail as required.	Not legally binding
Prescribe in regulations	Medium flexibility – requires updates through a legislative instrument made by Governor-General. Regulations are developed in a formal legal style, which may be less accessible to the public. Regulations typically include more detail than legislation such as the Disability Discrimination Act.	Legally binding
Prescribe in the Disability Discrimination Act	Least flexibility – requires updates through legislative amendments made by parliament. Legislation is developed in a formal legal style, which may be less accessible to the public. Legislation is typically high-level to allow it to apply across a broad range of circumstances.	Legally binding

Consultation questions

38. How could the protections for assistance animals be clarified for both people with disability and duty holders, including in relation to evidence of training, evidence or standards of hygiene and behaviour that are appropriate for a public place?
39. Would legislative amendments or guidance materials be helpful to balance flexibility and certainty, or a mixture of both?
40. Should specific training organisations be prescribed under the Disability Discrimination Regulations?

Disability action plans

Summary

- Duty holders may voluntarily prepare and implement an action plan under the Disability Discrimination Act. The purpose of an action plan is for organisations to set out a strategy to address practices which might result in discrimination against people with disability, as well as implementing specific policies and practices to promote the rights of people with disability.
- We have heard that there may be limitations to the effectiveness of action plans as there is no requirement for them to be updated over time or minimum standards for what they should include.
- We are seeking your views on whether guidance or minimum requirements could improve the effectiveness of disability action plans.

Discussion

A disability action plan may be provided to the Australian Human Rights Commission, who maintains a public register of action plans. There are currently over 650 action plans on this register from a broad range of organisations. Organisations may use an action plan to highlight their work to improve the accessibility of their products and services for people with disability, to educate their workforce on accessibility, and to recruit and retain more employees with disability.

Action plans provide an opportunity for duty holders to publicly commit to prevent disability discrimination, increase inclusivity and promote the rights of people with disability. Organisations may assess their performance against action plans over time, and commit to more ambitious actions in new iterations of action plans. A number of organisations develop their action plans in collaboration with the disability community, which provides an opportunity for organisations to learn from the lived experience of people with disability.

There are no minimum requirements in Commonwealth law for action plans and the Australian Human Rights Commission does not assess action plans. However, an action plan will be considered in the assessment of unjustifiable hardship during any conciliation processes with the Australian Human Rights Commission. In addition, while the public registration of action plans is important, it is not practical for members of the public to engage with the hundreds of plans registered to determine whether organisations are, or are not, meeting their obligations. Tasmania recently introduced new legislative amendments that clearly state what must be included in a disability access plan. *The Disability Rights, Inclusion and Safeguarding Act 2024* (TAS) formalises the requirements relating to consultation, planning and reporting of progress in delivering actions through a disability inclusion action plans.[241]

241 *Disability Rights, Inclusion and Safeguarding Act* (Tas) s 12.

The Australian Human Rights Commission has proposed the following reforms aimed at introducing further quality checks to the action plan process:

- Clarify that the Australian Human Rights Commission may provide advice on the development and implementation of action plans.
- Clarify that the Australian Human Rights Commission may set minimum requirements for action plans (such as through guidelines) and not accept action plans that do not meet these requirements.
- Introduce a set timeframe within which action plans will lapse, and require that outcomes of the evaluation of previous action plans be provided to the Australian Human Rights Commission when submitting a subsequent action plan.[242]

Disability action plans are also discussed in the Disability Standards section of this part.

Consultation questions

41. **Should there be minimum requirements for action plans (such as through guidelines) and what should the minimum requirements cover?**
42. **Should the Australian Human Rights Commission be able to reject action plans that fail to meet these requirements?**
43. **Should there be a set period of time for which an action plan is valid?**
44. **Are there any other changes to the action plan process that you would recommend?**

242 Australian Human Rights Commission, *Free and Equal: A reform agenda for federal discrimination laws*, Australian Government, 2021, p 123.

Disability Standards

Summary

- Disability Standards are legally binding legislative instruments that are made under the Disability Discrimination Act and supplement and support the Act by providing more detail on rights and responsibilities.[243] It is unlawful for a person to breach a Disability Standard.
- We note that the enforceability of the Disability Standards has previously been raised as a potential area of reform. Enforcement generally relies on individuals making complaints, and there is limited reporting on compliance with the Disability Standards.
- We are seeking your views on how the framework establishing the Disability Standards could be improved through the Disability Discrimination Act framework.

Discussion

There are currently 3 Standards made under the Disability Discrimination Act:

- The **Premises Standards** apply to certain new buildings or certain new work on parts of old buildings. The Premises Standards are co-administered by the Department of Treasury and the Attorney-General's Department.
- The **Education Standards** apply to education and training providers. The Education Standards are co-administered by the Department of Education and the Attorney-General's Department.
- The **Transport Standards** apply to all operators and providers of public transport services including the conveyances they use and supporting premises and infrastructure. The Transport Standards are co-administered by the Department of Infrastructure, Transport, Regional Development, Communications, Sport and the Arts and the Attorney-General's Department.

It is unlawful for a person to breach a Disability Standard. If a person or organisation complies with a Disability Standard, they will not be in breach of the Disability Discrimination Act.[244]

Stakeholders have raised concerns about the enforceability of the Disability Standards. The Disability Standards are currently enforced through complaint mechanisms in the Australian Human Rights Commission in the same way as other anti-discrimination protections. Stakeholders have argued that additional enforcement mechanisms could help address systemic non-compliance with the Disability Standards.

The content of the Disability Standards is not within scope of this review, as discussed in the Introduction. All Disability Standards made under the Disability Discrimination Act are already reviewed every 5 years to ensure they are still effective. These reviews are more frequent than other legislative instruments, which are reviewed every 10 years through a standard practice known as 'sunsetting'.

243 Australian Human Rights Commission, *Disability Standards*, n.d., Australian Human Rights Commission website, accessed 2 December 2024.

244 *Disability Discrimination Act 1992* (Cth) s 34.

Current arrangements for enforcing the Disability Standards

Individual complaints

A person can make a complaint about a breach of the Disability Standards to the Australian Human Rights Commission in the same way they can make a complaint alleging unlawful discrimination under the Disability Discrimination Act.

In many circumstances, a person can raise a complaint directly with the duty holder regarding an alleged breach of the Disability Standards. For example, in the education sector, individuals can raise and attempt to resolve complaints with their education provider.

In addition to individual complaints, some parts of the Premises Standards can be enforced through state and territory building laws and regulations as they are replicated in the National Construction Code.

Systemic inquiries

In 2022, the Australian Human Rights Commission was provided with additional powers to inquire into systemic or suspected systemic unlawful discrimination.[245]

Under these provisions, the Australian Human Rights Commission can conduct an inquiry into any matter that may relate to systemic unlawful discrimination.[246] Following an inquiry, the Australian Human Rights Commission can provide its findings to the Attorney-General and publish a report, which may include recommendations.[247]

Strengthening enforcement of the Disability Standards

Introduction of a positive duty

The Disability Royal Commission recommended that the Disability Discrimination Act should be amended to introduce a positive duty on all duty holders, including both public and private sector entities (the positive duty is discussed further in Part 2).

The introduction of a positive duty would require duty holders to take reasonable and proportionate measures to eliminate disability discrimination. This means that duty holders would need to ensure they are compliant with the Disability Standards to meet their obligations under the positive duty.

Under the current framework, individuals are responsible for making a discrimination complaint to the Australian Human Rights Commission if a duty holder is not complying with the Disability Standards. However, the positive duty would be enforced by a regulator, such as the Australian Human Rights Commission, who would have appropriate regulatory powers to address non-compliance without the need for an individual complaint. This enforcement model would reduce the burden on individuals to make discrimination complaints if a duty holder is not complying with the Disability Standards, and could strengthen compliance with the Disability Standards.

245 *Australian Human Rights Commission Act 1986* (Cth) s35L.
246 *Australian Human Rights Commission Act 1986* (Cth) s35L.
247 *Australian Human Rights Commission Act 1986* (Cth) 35Q.

Increasing the Australian Human Rights Commission's powers

Providing the Australian Human Rights Commission with additional powers to enforce compliance with the Disability Standards may also be beneficial. This could be achieved through the positive duty or through their powers to inquire into systemic unlawful discrimination. For example, the power to inquire into systemic unlawful discrimination (including breaches of the Standards) could be accompanied by enforcement mechanisms.

Additional action, depending on the findings of the inquiry, could be for the Australian Human Rights Commission to have the power to:

- apply to a court for civil penalty orders and injunctions
- issue compliance notices
- enter into enforceable undertakings.

These regulatory powers could attach to a positive duty (discussed in Part 2) in the Disability Discrimination Act. This action could be taken by the Australian Human Rights Commission without a complaint having to be brought forward by an 'aggrieved person.' The Australian Human Rights Commission already has similar powers to enforce compliance with the positive duty in the Sex Discrimination Act.

Reporting

There are currently limited reporting mechanisms for compliance with the Disability Standards. For example, the Access Code for Building (Schedule 1 of the Premises Standards) is replicated in the National Construction Code and is enforced through state and territory building laws and regulations. Duty holders also have the option to report on their compliance with the Disability Discrimination Act through their disability action plans.

Work is underway, or is proposed to commence, by the Department of Infrastructure, Transport, Regional Development, Communications, Sport and the Arts with respect to compliance reporting with the Transport Standards and new aviation-specific Disability Standards:

- The modernising reforms of the Transport Standards will implement non-mandatory guidance to encourage operators and providers to develop and publicly release information about their compliance with the Transport Standards. This proposal is intended to encourage entities to self-report their compliance with the Transport Standards.
- The Aviation White Paper, released in August 2024, announced that the government will publicly report on airlines' and airports' compliance with new aviation-specific Disability Standards, after those new requirements come into effect. The new aviation standards will be developed as a schedule to the Transport Standards.
  The government will co-design the aviation standards with people with disability and consult industry on the draft requirements in 2025.

Reporting frameworks can provide an important transparency and accountability mechanism and encourage greater compliance. The Disability Standards may be well suited to reporting mechanisms because they contain more direct and technical steps for compliance. Therefore, consideration could be given to introducing similar reporting initiatives across the Disability Standards that is currently being considered for the Transport Standards. However, consideration would also need to be given to whether such a framework could apply in practice across all of the Disability Standards, or if each set of Standards should be treated differently, given each Standard varies in content and form.

Encouraging compliance reporting in disability action plans

An option could involve amending the Disability Discrimination Act to encourage duty holders to report on their compliance with the relevant Disability Standards when preparing disability action plans. Organisations use action plans to outline strategies for making their services accessible and inclusive, and to inform the public on how they are approaching diversity and inclusion. This could be implemented by including compliance with the Disability Standards, and strategies for improving compliance, as another limb that duty holders should consider when submitting their disability action plans to the Australian Human Rights Commission. These amendments could then be further enhanced by the options discussed in the disability action plans section of this paper. This includes the Australian Human Rights Commission providing comprehensive guidance that is more strongly supported by the Disability Discrimination Act and being able to reject plans that are not of an appropriate standard.

Consultation questions

45. **How could compliance with and enforcement of the Disability Standards be improved?**
46. **Should the Disability Discrimination Act be amended to encourage relevant duty holders to self-report on their compliance with the Disability Standard(s) in disability action plans?**
47. **Could the Australian Human Rights Commission provide additional guidance to duty holders regarding how to self-report on the Disability Standards in disability action plans?**

Part 7 – Further options for reform

Summary

- The Disability Discrimination Act is intended to eliminate, as far as possible, discrimination against people on the basis of their disability. However, people with disability continue to experience discrimination and unacceptable treatment at a high rate, showing the need for changes to the law.
- The Disability Royal Commission made 15 recommendations to improve the Disability Discrimination Act. Other reviews, and various stakeholders, have also recommended improvements to the Disability Discrimination Act. Parts 1 to 6 of this paper invite your views on these recommendations and proposals.
- In addition to these recommendations and proposals, we are seeking your views on other ways the Disability Discrimination Act could be reformed to ensure it works for people with disability, sets out clear obligations for duty holders, and remains fit-for-purpose into the future.

Discussion

This paper has discussed 15 recommendations from the Disability Royal Commission relating to the Disability Discrimination Act, including the proposal to create a positive duty to eliminate discrimination, encourage inclusion of people with disability in public life and improve access to justice for people with disability.

This paper has also discussed other potential reforms proposed by stakeholders or recommended by past reviews, including amending the definition of disability, addressing intersectionality, providing clarity about assistance animals, providing guidance for disability action plans and improving the enforcement of the Disability Standards. This part of the paper considers further options to modernise and strengthen the operation of the Disability Discrimination Act, including guidance and support for duty holders.

Lessons from other anti-discrimination laws

Australia has many laws to address discrimination, including the Commonwealth anti-discrimination laws, state and territory anti-discrimination Acts, and the Fair Work Act. There are similarities and differences between these pieces of legislation. These differences mean there are many opportunities to learn lessons from other laws that could be applied to the Disability Discrimination Act.

Clarifying the operation of the law

It is important that both people with disability and duty holders can clearly understand their rights and obligations under the Disability Discrimination Act.

Public guidance materials, such as guidelines or web pages, can help explain the Disability Discrimination Act and translate legal concepts into actionable, practical steps. These do not have the same legal effect as legislation and the explanatory memoranda that accompany legislation, but have several advantages:

- They are significantly quicker and easier to change and update.
- They can be more easily found and accessed by the public.
- Different mediums, such as video, can be used to convey the information.

Future-proofing the Disability Discrimination Act

Australia has changed significantly in the 33 years since the Disability Discrimination Act commenced. This paper has explored a number of proposals to modernise the Disability Discrimination Act and ensure it reflects contemporary values. It is important that this landmark piece of legislation continues to evolve and remain fit-for-purpose in line with future social and technological change.

One way this could be achieved is through using wording that can be applied to a wide variety of circumstances. In some ways the Disability Discrimination Act already does this, such as through using the term '[reasonable] accommodation' which can adapt to technological changes. In other areas, the proposed amendments discussed in this paper, such as to the definition of disability, would help the Disability Discrimination Act reflect societal changes over time. There may be other changes which could further improve the Disability Discrimination Act's ability to adapt to societal and technological changes.

Other potential improvements

While this review is primarily focused on implementing the recommendations of the Disability Royal Commission, we also welcome views on any further amendments that could be made to modernise, simplify or streamline the Disability Discrimination Act that have not already been covered in this paper.

Consultation questions

48. **Are there examples of legislative provisions in Commonwealth or state and territory anti-discrimination law that could be drawn on to modernise or strengthen the Disability Discrimination Act?**
49. **What additional guidance materials should be provided to the community, including duty holders, about the operation of the Disability Discrimination Act or specific amendments proposed in this paper?**
50. **How can we ensure the Disability Discrimination Act remains fit-for-purpose into the future?**
51. **Are there any other issues with the Disability Discrimination Act that should be considered as part of this review?**